Supreme Court, U.S.
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No. 1

In The

Supreme Court of the United States

RICHARD E. WILMSHURST,

Petitioner,

v.

EDMUND G. BROWN, JR.,
ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. WILMSHURST, J.D.
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Pro Se

QUESTIONS PRESENTED

1. Whether the Ninth Circuit may hold that *Younger v. Harris* 401 U.S. 37 (1971), prevents the application of Title 26 U.S.C. § 5848, **restrictive use of information**, in a criminal action, when the State of California files a criminal action against a Federally Licensed Firearms Importer and the evidence used in the criminal prosecution is material furnished the Federal government under Federal Importer regulations of firearms inventory disclosure by the Federally Licensed Importer.

2. Whether Title 22 U.S.C. § 2778, **Control of arms exports and imports** provides a Federally Licensed Importer with sole Federal jurisdiction over his business of importing and exporting firearms and his firearms inventory under the United States Munitions list by the President of the United States and Congress.

3. Whether the conflict between two California Courts of Appeal's Published Decisions on the application of Title 26 U.S.C. § 5848 to two criminal cases involving Federally Licensed Importers, with the facts of each case being nearly identical to the other, should be reviewed.

Whether there is also a conflict between the Ninth Circuit decision and this Court's opinion in *United States v. Freed*, 401 U.S. 601 (1971), where the

QUESTIONS PRESENTED – Continued

Ninth Circuit applies *Younger v. Harris,* supra, to invalidate the later opinion of *Freed* in the application of § 5848.

In *People v. Sun*, 148 Cal.App. 4th 374 (2007), and *People v. Wilmshurst*, 146 Cal.App. 4th 621 (2007), the *Sun* (Defense Technology, Inc.), and Wilmshurst (Cal-Sierra Arms Distributors) decisions brought to the attention of the California Supreme Court in the depublication motion by the Federal Government and the State of California that there was a conflict in the Court of Appeal decisions. The California Supreme Court did not consider the fact that the *Sun* and *Wilmshurst* decisions were in conflict even though this fact was brought to its attention by all parties participating in the depublication review.

The conflicts set forth above affect all licensed firearms dealers in the United States.

LIST OF PARTIES

The parties before this Court are petitioner Richard E. Wilmshurst and respondent Edmund G. Brown, Jr., Attorney General of California. Petitioner in this Court was the plaintiff-appellant in action No. CV-04-00988-DFL/KJM in the court below. Respondent here was Bill Lockyer, Attorney General of California, Defendant-Appellee in action No. CV-04-00988-DFL/KJM in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard E. Wilmshurst respectfully petitions this Court to issue a Writ of Certiorari to review the April 30, 2007 panel decision; in the United States Court of Appeals for the Ninth Circuit (App. 1a) Denying Request for Oral Argument.

OPINIONS BELOW

The April 21, 2005 Order in the United States District Court for the Eastern District of California denying Temporary Restraining Order and Stay (App. 34a) is unreported. The July 7, 2007 Judgment on Petition for Panel Rehearing and Petition for Rehearing En Banc of the United States Court of Appeals for the Ninth Circuit (App. 45a) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals issued its panel decision on April 30, 2007. This Court has jurisdiction under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in this action the right not to

provide evidence against yourself at the direction of the government.

The Supremacy Clause of the U.S. Constitution provides, that a Federal statute is the law of the U.S. on the subject of the statute.

The Foreign Commerce Clause of the U.S. Constitution, in that the importation and exportation of firearms to foreign countries shall be under the sole jurisdiction of the Federal Government.

Title 26 U.S.C. § 5848 protects a firearms importer from the use of information provided the government as required by statute or regulation from being used in a criminal action by the Federal Government or state.

Title 22 U.S.C. § 2778 provides that the President and Congress, controls the importation and exportation of firearms to countries in the world based upon international affairs as determined by the President.

STATEMENT OF THE CASE

Petitioner

Petitioner, Richard E. Wilmshurst ("REW") was a Federally Licensed Firearms Importer, with the business name CAL-SIERRA ARMS DISTRIBUTORS, at the time the California Attorney General's Firearms Division, secured a search warrant and

later a criminal action based upon the inventory reported to the Federal Department of Justice.

Federal Importers in the United States

The Federal Government licenses two types of firearms businesses in the 50 United States. A firearms dealer who operates under Federal and State law because firearms are retailed to individual firearms buyers within the state and the firearms importer who operates under **only** Federal law in the import/export business and does not retail firearms with the possible exception of sales to the Federal, state governments and local police agencies.

Federal Firearms Importers are located in the 50 states and are individuals and corporations, i.e., General Motors who has two Federal firearms Import licenses in California.

The Federal firearms Importer Participates In International Affairs

The President of the United States controls the importation and exportation of firearms throughout the world by Federal Firearms Importers. This control is established by Title 22 U.S.C. § 2778.

The firearms control of the firearms inventory of each firearms importer is found in the United States Munitions List.

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As an example, the President banned the importation of defense articles from People's Republic of China. The Federal Importer in *B-West Imports v. United States*, 75 F.3d 633 (Fed. Cir. 1995), objected to termination by the President of an existing permitted contract for the importation of Chinese firearms.

What *B-West* found was that the President is in **total** control of its import business. Even though *B-West* had permits to import arms from China, the President could change the United States political position and cancel importation permits for firearms that had not been imported due to a change in foreign policy.

Federal Importers Are Not Subject to State Firearms Laws

The Ninth Circuit decision in this action conflicts with the Supremacy Clause of the United States Constitution, the Foreign Commerce Clause and Title 22 U.S.C. § 2778.

The action brought by REW should have been successful at the District court level and the California Attorney General's criminal action should have been ordered dismissed pursuant to Title 26 U.S.C. § 5848.

The Second Amendment is a volatile social issue in many states and the District of Columbia. California and the Ninth Circuit have taken the position that the Second Amendment does not apply to the

states through the Fourteenth Amendment and is not a personal right.

REASONS FOR GRANTING THE WRIT

I. THE COURTS ARE JUST AS CONFUSED AS THE LAW ABIDING AMERICAN CITIZENS REGARDING TWO DIFFERENT FEDERAL STATUTES

In *People v. Sun*, the same statutes were applied as in *People v. Wilmshurst*, however, the application was interpreted by the court in favor of *Sun*, and not in favor of *Wilmshurst* even though both cases are virtually identical. This confusion cannot go unexamined, given the important protections at stake that were afforded one licensed Federal Firearms Importer and not the other.

The confusion of the lower courts regarding the application of two different federal statutes, the Gun Control Act of 1968 ("GCA") and the National Firearms Act of 1934 ("NFA"), poses particular danger of abuse by the State. There is an immediate need for scrutiny which reaches far beyond the particular facts and parties involved. Non-examination of these conflicts could affect a great number of business people throughout the country.

II. THERE IS A CONFLICT BETWEEN THE THIRD DISTRICT IN *WILMSHURST* AND THE FOURTH DISTRICT IN *SUN* OF THE APPLICATION OF SECTION 5848 TO FIREARMS INVENTORY REQUIRED REPORTING AS A BASIS FOR A CRIMINAL SEARCH WARRANT AND PROSECUTION

In a request for depublication of *People v. Sun* (App. 71a), by Department of Justice Alison Y. Merrilees, Deputy Attorney General, Bureau of Firearms, for Edmund G. Brown Jr., Attorney General, states at (App. 72a): . . . "it confuses the applicability of two different federal statutes, the Gun Control Act (GCA) and the National Firearms Act (NFA) . . . " Merrilees goes on to say (App. 78a) "The Court of Appeal's analysis of state firearms law and its relationship to federal firearms law also threatens to breed confusion." And, (App. 79a):

> The *Sun* decision, ill-explained and based on an unusually opaque record, is unfortunate because it undermines the full and correct treatment of the same issue in the recent published decision by the Third District Court of Appeal in *People v. Wilmshurst* (2007) 146 Cal.4th 621. Unlike the record in *Sun*, the record in *Wilmshurst* showed that the trial court considered the meaning and applicability of both the NFA and the GCA. The basic facts of the two cases, however, are virtually identical.

The footnote to the above statement is as follows: "The *Wilmshurst* decision was published approximately

two weeks before the oral argument in *Sun* and brought to the attention of the deputy district attorney handling the appeal in *sum* (sic). Amicus did not bring the case to the attention of the Court of Appeal because the deputy district attorney assured Amicus that he would file the paperwork necessary to discuss the case at the oral argument."

Federally Licensed Firearms Importers in all 50 states are at risk of state criminal prosecution whenever the Alcohol, Tobacco, Firearms and Explosives ("ATF") is provided with the Federal import inventory as required by statute and by regulation.

Attachment B – Amicus Brief to the request for depublication, in pertinent part, at (71a) is by Pamela J. Hicks, Division Counsel of the California Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). Ms. Hicks states: (App. 83, 84) "At almost every state of this case lawyers and the California courts have conflated and confused two separate and distinct federal laws – the Gun Control Act of 1968 ("GCA") and the National Firearms Act of 1934 ("NFA")." See (App. 89a) "Although it is frustrating that the Court of Appeal seemed to be as confused as the Superior Court about the applicability of the GCA and the NFA in this case, it is understandable given the state of the record." And at (App. 90a) "From the beginning this case has been hampered by an incomplete record and confusion over the federal firearms laws. Publishing it provides no useful guidance to the public and, in fact, is likely to confuse rather than clarify the federal firearms laws."

III. THIS PETITION FOR WRIT OF CERTIORARI MUST BE GRANTED TO CORRECT THE CONFLICT BETWEEN THE THIRD AND FOURTH DISTRICTS IN THE APPLICATION OF TITLE 26 U.S.C. § 5848 TO TWO CASES WITH IDENTICAL FACTS

Federally Licensed Firearms Importers, in all 50 states are at risk of state criminal prosecution whenever he/she provides the Alcohol, Tobacco and Firearms ("ATF") with their Federal import inventory as required by statute and regulation. The Federal Import inventory provided ATF may be shared with the state where the Federal Import dealer is located without ATF advising the state of the Federal requirement of Title 26 U.S.C. § 5848, not to use the information in criminal actions against the Federal Importer.

Over the past 50 years the federally licensed firearms dealer has gone from a dealer who is responsible to the state and ATF to an additional business of an importer who is responsible only to the President and Congress, doing business in foreign Commerce.

The Federally Licensed Importer has become an agent for the President in International affairs and responsible for his direction by Proclamation and direction through a Federal agency. See, *United States v. Curtis Wright Export Corp.*, 299 U.S. 304 (1936).

CONCLUSION

This Petition is involved in several important legal conflicts involving the firearms business within the United States.

It is respectfully requested that certiorari be granted to assist national businesses dependent upon the Second Amendment to be protected from the misapplication of Federal Law by Federal and State Courts.

November 20, 2007

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD E. WILMSHURST Plaintiff - Appellant, v. EDMUND G. BROWN JR., The Attorney General of the State of California*; et al., Defendants - Appellees.	No. 06-15385 D.C. No. CV-04-00988-DFL/KJM MEMORANDUM** (Filed Apr. 30, 2007)

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Submitted April 16, 2007***

BEFORE: GRABER, CLIFTON, and BEA, Circuit Judges.

Richard E. Wilmshurst appeals pro se from the district court's judgment dismissing his action pursuant to the *Younger* abstention doctrine. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review

* Edmund G. Brown, Jr. is substituted for his predecessor as California Attorney General. Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Wilmshurst's request for oral argument is denied.

de novo a district court's decision to abstain on *Younger* grounds, *Dubinka v. Judges of Superior Court of State of Cal. for County of Los Angeles,* 23 F.3d 218, 221 (9th Cir. 1994), and we affirm.

The district court properly dismissed Wilmshurst's action pursuant to *Younger v. Harris,* 401 U.S. 37 (1971). First, there were no "proceedings of substance on the merits" in the federal action at the time the state re-filed criminal charges against Wilmshurst. *See Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 1987) (holding that district court's refusal to grant a preliminary injunction prior to filing of state case was not a "proceeding of substance on the merits"). Second, the state proceedings implicated an important state interest in firearms regulation. *See Younger,* 401 U.S. at 43-49, 91 S.Ct. 746 (state criminal proceedings implicate important state interests). Third, Wilmshurst had an adequate opportunity to raise federal questions in the state proceedings. *See Baffert v. Cal. Horse Racing Bd.,* 332 F.3d 613, 619 (9th Cir. 2003) ("*Younger* abstention applies even if the constitutionality of the pending proceedings is at the heart of Plaintiff's claim.").

Finally, the record does not support a finding of bad faith or any other extraordinary circumstance that would render abstention inappropriate. *Id.* at 621 (defining and explaining the exceptions to the *Younger* abstention doctrine).

AFFIRMED.

People v. Wilmshurst (2007) 146 Cal.App.4th 621, - Cal.Rptr.3d -

[No. C050103. Third Dist. Jan. 8, 2007.]

THE PEOPLE, Plaintiff and Respondent, v. RICHARD E. WILMSHURST, Defendant and Appellant.

[Opinion certified for partial publication.*]

(Superior Court of Calaveras County, No. F3229, Richard K. Specchio, Thomas A. Smith, and William M. Kelsay, Judges.†)

(Opinion by Davis, Acting P.J., with Hull, J., and Robie, J., concurring.)

COUNSEL

Thomas M. Marovich for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, J. Robert Gibson and Janine R. Busch, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of sections IV., V., VI., VII. and VIII. of the Discussion.

† All assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION

DAVIS, ACTING P.J. –

A jury convicted defendant Richard Wilmshurst of unlawfully possessing a machine gun and illegal assault weapons. Finding this to be an unusual case, the trial court suspended imposition of sentence and placed him on probation.

On appeal, the defendant contends that the search warrant used to seize firearms from him, and the use of statements he made during the search, violated his privilege against self-incrimination. He also contends that the warrant was overbroad; that federal law preempts the state firearms control laws; that he was denied a fair hearing; and that the jury was improperly instructed.

In the published part of the opinion we hold that including in the search warrant affidavit information defendant's federal firearms license required him to keep, and information from an inspection he was required to submit to, did not violate his privilege against self-incrimination. Nor do we find that federal law preempts Penal Code sections 12220, subdivision (a) and 12280, subdivision (b), which respectively proscribe possession of machine guns and certain assault weapons. Finding no merit to defendant's remaining contentions, we will affirm the judgment.

Because the defendant does not dispute his ownership of these weapons that are unlawful to possess under state law, we will not provide a separate

summary of facts. Instead, we will include the facts relevant to his contentions in the discussion.

DISCUSSION

I. *Procedural and Factual Background*

A

During the course of his preliminary hearing, the defendant moved to suppress evidence (Pen. Code, § 1538.5),[1] asserting the invalidity of the search warrant on several grounds. The magistrate denied the motion and held the defendant to answer.

In the superior court, the defendant requested a special hearing to renew his motion to suppress (§ 1538.5, subd. (i)), and sought to introduce additional evidence. The prosecution objected to the receipt of additional evidence. The trial court held a hearing in camera on the issue of whether this evidence had been reasonably available to the defendant at the time of the preliminary hearing. (*Ibid.*)

At the hearing in camera, the defendant asserted that until the preliminary hearing, he was unaware that two of the agents who were present at the execution of the warrant had engaged in conduct relevant to his arguments about the overbreadth of the search. The court had its doubts whether the information concerning the extent of the agents' conduct was truly

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[1] Further undesignated section references are to the Penal Code.

unavailable at the time of the preliminary hearing, but it also stated that it did not believe the conduct of these two agents was relevant to any theory of overbreadth. As a result, it denied the motion to introduce additional evidence.

Following the hearing in camera, the court prepared to set the matter for trial. The prosecutor reminded the court that it needed to rule on the renewed motion to suppress, limited to the record at the preliminary hearing.[2] The court then stated, "It's denied," before returning to the matter of setting a trial date. Neither defense counsel nor the defendant (who had been granted cocounsel status) raised any objection to the manner in which the court disposed of the motion before the parties adjourned for the day shortly thereafter.

B

As the superior court decided the renewed motion to suppress on the record of the preliminary hearing, we disregard its ruling and review the issue independently, resolving express or implied factual conflicts in favor of the magistrate's ruling. (*People v. Nonnette* (1990) 221 Cal.App.3d 659, 664.)

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[2] This included transcripts from a preliminary hearing in an earlier proceeding (Super. Ct. Calaveras County, No. F2909) that had been dismissed pursuant to section 995.

A federal firearms official went to the defendant's home to perform a compliance inspection in connection with the defendant's federal license for importing weapons. Her supervisor had assigned her the case after determining that the defendant was not on a state list of authorized firearm dealers, which he obtained from time to time for purposes of cross-checking federal licensees. This triggered an interest in determining whether the defendant was conducting any operations that would require compliance with state law. In the course of her review of his records and about 21 firearms, she found several that came within California's ban against assault weapons (although they were proper under federal law). When she questioned him about them, he invoked "the Supremacy Clause." (U.S. Const., art. VI, § 2 ["the laws of the United States . . . shall be the supreme law of the land, . . . any thing in the . . . laws of any state to the contrary notwithstanding"].) Pursuant to a policy of her department, she reported her observations of possible violations of state law to California firearms officials, even though there had not been any request from them for this information. She also notified the local officials of Angels Camp that the defendant might be operating a business without a business license.

The California authorities determined that the defendant was not a registered firearms dealer under California law, nor had he taken advantage of a "grandfathering" registration program for otherwise-illegal assault weapons possessed before the state ban

went into effect. On this basis, they obtained a search warrant for the defendant's car dealership and the outbuilding at his residence. On the first floor of the outbuilding were a storage area and his living quarters with a bedroom. Under the bed and in a wooden footlocker were three submachine guns; seven other illegal assault weapons were in the storage area. These were the weapons that were the basis for the charges against the defendant. The agents also seized every other firearm they encountered, some of which were lawfully possessed.

II. *Fifth Amendment Claim Regarding Records and Inspection*

The defendant contends that including in the affidavit for the search warrant information from records his federal firearms license required him to keep and from an inspection he was required to submit to under federal firearm laws was a violation of his privilege against self-incrimination. He relies on *Haynes v. United States* (1968) 390 U.S. 85 [19 L.Ed.2d 923] (*Haynes*); *Lauchli v. United States* (7th Cir. 1973) 481 F.2d 408 (*Lauchli II*); and *Lauchli v. United States* (7th Cir. 1970) 432 F.2d 1207 (*Lauchli I*), judg. vacated and cause remanded (1971) 402 U.S. 938 [29 L.Ed.2d 106], opn. following remand *Lauchli II, supra,* 481 F.2d 408. Defendant is mistaken.

"[T]here is some possibility of prosecution – often a very real one – for criminal offenses disclosed by or deriving from the information that the law compels a

person to supply. . . . But under our holdings[,] the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here [that requires those involved in an accident to provide a name and address]." (*California v. Byers* (1971) 402 U.S. 424, 428 [29 L.Ed.2d 9].) As summarized in *Byers,* the cases in which the United States Supreme Court has found the privilege against self-incrimination to bar prosecution[3] involve statutes targeting a "'highly selective group'" that is "'inherently suspect of criminal activities,'" and the focus of the required disclosure is subject matter "'permeated with criminal statutes'" rather than "'an essentially noncriminal and regulatory area of inquiry.'" (*Id.* at p. 430.) As neither driving nor involvement in an accident are unlawful, the required disclosures did not pose a substantial risk of self-incrimination. (*Id.* at p. 431; accord, *Shapiro v. United States* (1948) 335 U.S. 1, 3-5, 32-33 [92 L.Ed. 1787] [proper to prosecute violation of price controls based on sales records that defendant required to keep under law; any privilege in private papers against self-incrimination does not apply to "public" records kept as required by law for the purpose of collecting information on transactions

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[3] *Marchetti v. United States* (1968) 390 U.S. 39 [19 L.Ed.2d 889] (gambling tax and registration requirements); *Grosso v. United States* (1968) 390 U.S. 62 [19 L.Ed.2d 906] (same); *Albertson v. Subversive Activities Control Bd.* (1965) 382 U.S. 70 [15 L.Ed.2d 165] (registration as member of Communist organization).

that are proper subject of government regulation]; *United States v. Sullivan* (1927) 274 U.S. 259, 263 [71 L.Ed. 1037] [no privilege involved in fulfilling generally aimed obligation to provide information in a tax return].)

Haynes involved a requirement for "persons who have obtained possession of a firearm without complying with the Act's other requirements" (*Haynes, supra,* 390 U.S. at p. 96) to register the firearm with the Secretary of the Treasury (pursuant to a scheme for the taxation of "weapons used principally by persons engaged in unlawful activities"(*id.* at pp. 87, 88))[4] or face criminal prosecution. (*Id.* at p. 89.) As this registration obligation is aimed at persons "immediately threatened by criminal prosecutions" should they comply (*id.* at p. 96), such that the correlation between registration and a prosecution for the underlying possession could be regarded only "as exceedingly high" (*id.* at p. 97), the statutory scheme did not come within the exception to the privilege against self-incrimination for regulatory programs of general application (*id.* at pp. 98-99); therefore, that privilege provided "a full defense" (*id.* at p. 100).[5]

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[4] The act at issue was chapter 53 of title 26, United States Code, popularly called the National Firearms Act. (See 26 U.S.C. § 5849.)

[5] After subsequent amendment, the National Firearms Act required only *lawful* possessors of the targeted weapons to register and to record any transfer to another party; it prohibited, however, the transferee from registering the weapon, and

(Continued on following page)

Applying these precedents, *United States v. Resnick* (5th Cir. 1974) 488 F.2d 1165 concluded that "the record-keeping provisions of the federal firearms laws" (in this case, the Gun Control Act of 1968 (18 U.S.C. § 921 et seq.)) were *not* "directed at a highly selective group inherently suspect of criminal acts" but instead "regulate[d] an essentially noncriminal activity, the sale of firearms" and therefore did not transgress the privilege against self-incrimination. (*Id.* at p. 1168; accord, *United States v. Flores* (9th Cir. 1985) 753 F.2d 1499, 1501-1503 (*Flores*) [a provision requiring notice to carrier before shipping firearms does not violate privilege against self-incrimination]; *United States v. Scherer* (7th Cir. 1975) 523 F.2d 371, 375-376 [record obligations do not automatically subject licensees to criminal penalties; thus records are public documents not subject to privilege].)

Lauchli I, involving requirements in the National Firearms Act other than registration, stated that determining whether the petitioner came within the holding of *Haynes* is "in a sense" a question of fact, and accordingly remanded to the trial court to resolve the question. (432 F.2d at pp. 1210-1211.) *Lauchli II*

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made it unlawful to possess an unregistered weapon. (*United States v. Freed* (1971) 401 U.S. 601, 603-604, 605 [28 L.Ed.2d 356].) The revised statute prohibited the use of any information collected for criminal proceedings involving a violation of federal or state law that occurred before or concurrent with registration or transfer. (*Id.* at pp. 604, 605-606.) This eliminated any concerns about compelled self-incrimination. (*Id.* at p. 606.)

accepted the trial court's factual findings that manufacturers are not "almost exclusively individuals inherently suspect of criminal activities"; since the provisions at issue were directed both "at law-abiding persons as well as criminally suspect persons," no risk was presented of automatic self-incrimination. (481 F.2d at p. 411.) *Lauchli II* also did not accept a claim that compliance with federal law would make the petitioner subject to prosecution under state law because the federal registry would be available to state officials: "a Class I manufacturer [under the federal law] could be in compliance with Illinois law according to the type of weapon manufactured. . . . Thus whether or not petitioner was violating Illinois law, he would not be inherently suspect of such violation by complying with the [federal act]." (*Id.* at p. 412.)

The defendant claims that the facts show an effort on the part of federal firearm agents to uncover violations of state firearms law when they inspect the firearms records required under federal law. He therefore contends that he is targeted for prosecution within the meaning of *Haynes*. He also contends there must be an evidentiary hearing on the extent to which those holding federal firearm importing licenses are at risk of prosecution under state law, citing *Lauchli I*.

To the contrary, the Gun Control Act of 1968 compels the keeping of records of transactions that are the legitimate (if disputed) subject of regulation, a requirement that applies generally without

inherently subjecting any particular group to the risk of prosecution. As *Lauchli II* points out in connection with the National Firearms Act, nothing prevents persons subject to the records requirements under federal law from complying with state law, and thus they also could not be considered as targets of prosecution under state law. Since the federal law does not itself target recalcitrant state residents such as the defendant who choose to violate state law, it is irrelevant that federal officials use the records to determine if anyone in the general population of federal license holders are in possible violation of state law and report these potential transgressors to state firearm authorities.[6] (481 F.2d at p. 412; cf. *Flores, supra,* 753 F.2d at pp. 1501-1502 [while subject matter of firearms is permeated with criminal statutes, notice requirement does not implicate activity illegal per se and is aimed at public at large, considerations which outweigh possibility that recipients of notice might report illegal shipments to authorities].)

We also disagree with defendant's contention that these conclusions must be based on empiric evidence rather than abstract analysis. We do not believe *Lauchli I* compels such a conclusion, other than as an option that particular court chose to

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[6] This would be the same circumstance as cooperative efforts between the Internal Revenue Service (IRS) and the Franchise Tax Board (FTB) to determine tax evasion from a comparison of state and federal tax returns. (E.g., Rev. & Tax. Code, § 19551 [allowing FTB to release tax information to IRS].)

exercise in resolving the issue of the interplay of the statutes before it. Moreover, a decision of a lower federal court does not have any binding force as precedent (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292 (*Bradford*)), and we are not persuaded that an evidentiary hearing is a necessary procedure. (See *Flores, supra,* 753 F.2d at p. 1500 [whether notice requirement conflicts with privilege against self-incrimination is a question of law reviewed de novo].)

We conclude the search warrant properly incorporated facts derived from the firearms records the defendant was compelled to keep under federal law. As a result, the trial court properly denied this ground of his renewed motion to suppress.

III. *Federal Preemption*

In conjunction with his renewed motion to suppress, the defendant also moved in superior court to dismiss one of the charges on the ground of federal preemption and a violation of the Foreign Commerce clause (U.S. Const., art. I, § 8, cl. 3). The court denied the motion. The defendant contends this was error.

A

The Gun Control Act of 1968 expressly eschews any intent to preempt state regulation of firearms except in the case of a direct and irreconcilable conflict (18 U.S.C. § 927), it being the intent of Congress only to strengthen control over interstate and foreign

commerce in firearms and to assist intrastate control over them. (See *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp* (9th Cir. 1992) 965 F.2d 723, 726, fn. 4.) Regulations implementing the act expressly state that a license issued pursuant to it does not confer any right to conduct business or activity contrary to state law.[7] (27 C.F.R. § 478.58 (2006).) The defendant consequently reaches for a more attenuated basis for his preemption claim.

The President of the United States is authorized to maintain a list regulating the import of designated arms, ammunition, and implements of war. (22 U.S.C. § 2778.) This list (the U.S. Munitions Import List) and regulations relating to it appear in part 447 of the Code of Federal Regulations (27 C.F.R. (2006).) The regulations provide that any items on the list which are firearms or ammunition within the meaning of the Gun Control Act of 1968 are subject to the controls on interstate and foreign commerce contained in that act and any person who imports such items must be licensed pursuant to that act. (27 C.F.R. § 447.2(a) (2006).)

The defendant perceives an implied declaration of an intent to occupy the field regulating items on the list, because the regulations relating to the list do

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[7] The defendant's license includes this caveat, stating it "does not permit you to receive . . . firearms . . . without first obtaining the proper state . . . license, if any. Please check with your local authorities."

not include any equivalent express declaration that they are *not* intended to preempt state regulation. We find the reference to the need to comply with the controls on commerce in the Gun Control Act of 1968 to be a sufficient indicia of congressional intent not to preempt state regulation over items on the U.S. Munitions Import List if they are of a type ordinarily coming within the former act. This would be a rational means of avoiding a duplication of regulatory effort. The defendant does not otherwise provide any authority indicating a Presidential concern with state encroachment on the power to regulate items on the U.S. Munitions Import List after import. We therefore conclude that prohibiting a resident from owning types of firearms that can otherwise be lawfully imported does not transgress federal authority, which instead condones stricter local controls.

B

The defendant's alternative argument is that a state ban on types of legally imported firearms constitutes an impermissible burden on foreign commerce. He cites a case that invalidated a California *tax* on instrumentalities used in foreign commerce that would have prevented the federal government from maintaining uniformity in treatment of international trade. (*Japan Line, Ltd. v. County of Los Angeles* (1979) 441 U.S. 434, 453-454 [60 L.Ed.2d 336].) However, he does not even begin to explain how the principles limiting *taxation* of foreign commerce apply to the present facts. In light of the

inadequate argument, we disregard the claim. (*People v. Oates* (2004) 32 Cal.4th 1048, 1068, fn. 10.) In any event, where Congress has struck an express balance in its regulation of the interests involved in interstate or foreign commerce, a court no longer has any role in identifying possible burdens. (*Merrion v. Jicarilla Apache Tribe* (1982) 455 U.S. 130, 154-155 [71 L.Ed.2d 21]; *Japan Line, supra,* 441 U.S. at p. 454 [noting, in context of foreign commerce, that courts must balance competing interests in *absence* of any expression of congressional intent].) As with the issue of preemption, the regulations implementing the U.S. Munitions Import List indicate clear congressional intent to allow any items that would come within the Gun Control Act of 1968 to be subject to the same commerce principles that allow individual states to regulate them after import. Presumably, once the list establishes the necessary uniform voice in the treatment of munitions from around the world (*Japan Line, supra,* 441 U.S. at p. 448), it is not of any federal concern that a state declines to be a final destination for them.

C

On several occasions, the defendant moved to dismiss the charges against him on the basis of the federal statutory use immunity added to the National Firearms Act. He reasserts this proposition on appeal.

The National Firearms Act (26 U.S.C. § 5801 et seq.) taxes and regulates (with various registration

and other requirements) the import, manufacture, making, and transfer of machine guns, destructive devices, and certain other firearms. (See 26 U.S.C. § 5845.) The chapter contains a statutory use immunity from criminal prosecution for information obtained "in order to comply with any provision *of this chapter* [i.e., 26 U.S.C. §§ 5801-5872]" (italics added). By contrast, the duty on the defendant to maintain records and to permit warrantless inspections of them stems from the Gun Control Act of 1968. (18 U.S.C. § 923(g)(1)(B)(ii).) The use immunity provision of the National Firearms Act has no application in this context, and the defendant does not provide any authority for importing its provisions into an entirely different act. The contention is consequently without merit.

IV-VIII*

DISPOSITION

The people's motion for judicial notice is denied. The judgment is affirmed.

Hull, J., and Robie, J., concurred.

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* See footnote *, *ante*, page 621.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD E. WILMSHURST,
Plaintiff,

vs.

BILL LOCKYER,
Attorney General,
Defendant.
/

No. CIV S-04-0988 DFL KJM PS

ORDER

Plaintiff, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 72-302(c)(21).

On August 2, 2005, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice to the parties that any objections to the findings and recommendations were to be filed within twenty days. Objections to the findings and recommendations have been filed.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed August 2, 2005, are adopted in full;

2. Defendant's motion to dismiss is granted;

3. The court declines to exercise jurisdiction over any pendent state claims; and

4. This action is dismissed.

DATED: 2/8/2006

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD E. WILMSHURST,
Plaintiff,

vs.

BILL LOCKYER,
Attorney General,
Defendant.
/

No. CIV S-04-0988
DFL KJM PS

ORDER AND
FINDINGS AND
RECOMMENDATIONS

Defendant's motion to dismiss the first amended complaint came on regularly for hearing June 29, 2005. No appearance was made for plaintiff.[1] Zackery Morazzini appeared for defendant. Upon review of the documents in support and opposition and supplemental briefing provided following the hearing, upon hearing the arguments of counsel, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

I. Background

On October 24, 2003, the Attorney General's Office filed an Information in Calaveras County Superior Court, charging plaintiff with nine counts of

[1] Plaintiff contacted the court after the hearing and advised he intended to appear but was delayed by the inability to locate parking near the courthouse. The court granted plaintiff's request to submit supplemental briefing to cover the points he had intended to make at oral argument.

violating California Penal Code section 12280(b) (possession of an assault weapon) and one count of violating California Penal Code section 12220(a) (possession of a machine gun). Def't's First Request for Judicial Notice (First Request), Ex. A (Information in *People v. Wilmshurst,* F2909). The Superior Court dismissed the information on April 13, 2004. Pl.'s Exhibits Re: Chronology (Chronology), Ex. 25 at 12 (reporter's transcript of hearing). On April 22, 2004, defendant filed a motion to resubmit the case to the magistrate, under the authority of California Penal Code section 997. First Request, Ex. B (motion).

Plaintiff filed this action on May 20, 2004.

The Superior Court heard argument on defendant's motion to resubmit on May 25, 2004. Chronology, Ex. 24 (reporter's transcript of hearing).

On June 4, 2004, plaintiff filed a motion for a temporary restraining order and preliminary injunction in this action.

On June 21, 2004, the Superior Court denied defendant's motion to resubmit the case to the magistrate and informed defendant his recourse was to refile criminal charges. Def't's Second Request For Judicial Notice (Second Request), Ex. C (order).

On July 7, 2004, this court issued an order and findings and recommendations denying the temporary restraining order and recommending the preliminary injunction be denied. On the same date, defendant filed Information number F3229, charging

plaintiff with the same criminal charges. Second Request, Ex. D (Information). The July 7th findings and recommendations were adopted in full on January 4, 2005.

On July 12, 2004, defendant moved to dismiss this action. On October 12, 2004, this court issued findings and recommendations recommending a grant of defendant's motion to dismiss based upon *Younger* abstention. This motion to dismiss was rendered moot by plaintiffs filing an amended complaint.

On March 11, 2005, a jury in the state court prosecution found plaintiff guilty of possessing assault weapons and one MP-40 in his firearms inventory. First Am. Compl. at 5.

On April 12, 2005, plaintiff filed his first amended complaint in this action. The amended complaint is substantially similar to the original complaint but adds Calaveras County Superior Court as a defendant, alleges preemption based on 22 U.S.C. § 2778 providing for federal registration by exporters of firearms, and improper use of plaintiff's importer's inventory under 26 U.S.C. § 5848. On April 22, 2005, defendant filed the pending motion to dismiss, which plaintiff has opposed.

II. Standards For A Motion To Dismiss

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question. *See Hospital Bldg. Co. v. Trustees of Rex*

Hosp., 425 U.S. 738, 740 (1976). The court must also construe the pleading in the light most favorable to the party opposing the motion and resolve all doubts in the pleader's favor. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Moreover, pro se pleadings are held to a less stringent standard than those drafted by lawyers. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1294 (9th Cir. 1981).

Generally, a court decides motions to dismiss on the pleadings alone. A court, however, may consider certain materials – documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice – without converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Records from the state court are subject to judicial notice. *Miles v. State of California*, 320 F.3d 986, 987 n.1 (9th Cir. 2003); Fed. R. Evid. 201(d). Defendant's July 12 and September 22, 2004 requests for judicial notice previously have been granted. Plaintiff's Chronology of September 23, 2004, to the extent it can be read as a request for judicial notice, will be granted now.

Defendant argues that the case is subject to *Younger*[2] abstention; the Anti-Injunction Act prevents the court from acting, 28 U.S.C. § 2283; plaintiff lacks standing to challenge California assault weapons laws under the Second Amendment; defendant is entitled to Eleventh Amendment immunity as to plaintiff's claims about missing coins and gold; and the court should not retain jurisdiction over pendent state claims once the federal claims are dismissed. Def't's April 22, 2005 Mot. to Dismiss (Mot. to Dismiss) at 4-13.

Plaintiff counters that *Younger* abstention does not apply because the state prosecution was taken in bad faith; the court should decline to apply *Younger* abstention because there are extraordinary circumstances present; and the Anti-Injunction Act does not apply. Pl.'s Opp'n to Mot. to Dismiss (Opp'n) at 3-5.

III. Younger Abstention

In *Younger*, 401 U.S. at 43, 54, the Supreme Court recognized the "longstanding public policy against federal court interference with state court proceedings . . . " and reversed the District Court's enjoining of a prosecution against Harris for violations of California's criminal syndicalism statutes.

Subsequent cases have distilled the principles of *Younger* into a three-part test: a federal court should

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[2] *Younger v. Harris*, 401 U.S. 37 (1971).

abstain from adjudicating a lawsuit if (1) there are pending state judicial proceedings, (2) the state proceedings implicate important state interests, and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982). Even if the *Younger* factors counsel abstention, a court may enjoin a proceeding if the plaintiff shows the prosecution is undertaken in bad faith or for harassment. *Younger,* 401 U.S. at 54.

A. Pending State Proceeding

Whether a state action is "pending" for *Younger* purposes is not determined by a simple comparison of filing dates. *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 1987). If the state action was filed before the federal case proceeded beyond an embryonic stage or the federal court has conducted any proceedings on the substance of the merits of the case, the first *Younger* requirement is met. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 238 (1984); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 929 (1975). Neither the denial of a temporary restraining order, nor service of the complaint, nor the determination of a motion for a preliminary injunction without a hearing constitute proceedings of substance on the merits of the action. *Hicks v. Miranda,* 422 U.S. 332, 338-39 (1975); *Polykoff,* 816 F.2d at 1332. In this case, the state action, filed the same day as this court's July 7, 2004 findings and recommendations regarding injunctive

relief, is "pending" for purposes of *Younger* abstention.

In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975), the U.S. Supreme Court held that even where the appellee's trial was over by the time Pursue brought its federal complaint, a losing party like Pursue must exhaust its state appellate remedies before seeking relief in the federal court, unless an exception to *Younger* applies. In *World Famous Drinking Emporium, Inc. v. Tempe,* 820 F.2d 1079, 1082 (9th Cir. 1987), the Ninth Circuit held, for *Younger* abstention purposes, exhaustion of state appellate remedies did not occur until the losing party appealed the adverse rulings to the state Supreme Court. Failure to exhaust state appellate remedies satisfies the requirement of ongoing state proceedings. *Id.*

Plaintiff, who now has lost his case in state court, has not provided any evidence to show he has exhausted his state appellate remedies. The first requirement of *Younger* thus has been met.

B. Important State Interest

Younger held that interference with a state criminal prosecution would disrupt the exercise of a basic state function, "prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and Constitution." *Younger,* 401 U.S. at

51-52. A criminal prosecution implicates important state interests.

Plaintiff relies on *Champion International Corporation v. Brown*, 731 F.2d 1406 (9th Cir. 1984), to argue the state has no interest in pursuing a federally licensed firearms importer, because federal law preempts state regulation. *Champion* is inapposite, for it involved a state civil action on a topic preempted by the federal Employment Retirement Income Security Act, 29 U.S.C. § 1144(a). The instant case, in contrast, involves a criminal prosecution of gun related offenses. While Congress has enacted extensive legislation in the field, federal law has been interpreted to permit, not preempt, state regulation of firearms. *Oefinger v. Zimmerman,* 601 F. Supp. 405, 411-12 (W.D. Pa. 1984), *aff'd*, 779 F.2d 43 (3d Cir. 1985) ("the federal scheme . . . does not displace the power of the State to determine that certain offensive weapons should not be possessed within the boundaries of the State").

Given the importance of the state's interest in firearms regulation, the second requirement of *Younger* abstention has been met.

C. Opportunity To Raise Federal Questions

"Where valid state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of constitutional claims.' *Middlesex County Ethics Comm.*, 457 U.S. at 432 (internal citation omitted). Federal plaintiffs "need be

accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings. . . ." *Juidice v. Vail,* 430 U.S. 327, 337 (1977); *Communications Telesystems International v. California Public Utility Commission,* 196 F.3d 1011, 1019-20 (9th Cir. 1999). Plaintiff has not pointed to any procedural bar to the state court's considering his preemption and Second Amendment arguments in the pending criminal proceeding. *See People ex rel. State Air Resources Board v. Wilmshurst,* 68 Cal. App. 4th 1332, 1333-34 (3d Dist. 1999) (considering preemption defense to state proceedings for emissions violations). Thus the third requirement of *Younger* is met as well.

D. Bad Faith

In *Kugler v. Helfant,* 421 U.S. 117, 126 n.6 (1975), the U.S. Supreme Court held that in the *Younger* abstention context, bad faith "generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." Plaintiff argues that defendant knew he could not get a valid conviction because the prosecution was based on information protected by 26 U.S.C. section 5848, a section of the Internal Revenue Code. Opp'n at 3-4.

Section 5848 forbids the direct or indirect use of information, obtained from federal firearm applications or registrations required to be retained or submitted to comply with the Internal Revenue Code, as evidence against a person in a criminal proceeding

with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration. 26 U.S.C. § 5848.

In this case, it is not clear that section 5848 has any application to plaintiff's claims. The factual record does not show that the criminal proceeding was based on evidence obtained from any of the records covered by section 5848. California firearms agents began looking into the case after being notified of possible state law violations by a federal ATF agent, who saw the illegal weapons during a routine ATF inspection. *See, e.g.*, First Am. Compl., Ex. A. Plaintiff has not alleged facts or provided any information showing that the federal agent disclosed information from covered records to the state or that the state used any such information in its prosecution. Thus, plaintiff has not shown that the prosecution was brought in bad faith, notwithstanding any theoretical protections section 5848 might provide him.

E. Extraordinary Circumstances

Plaintiff argues that he is suffering irreparable harm because the criminal action violates the Fifth and Fourteenth Amendments. Also, he is in danger of losing his family's automobile business because of the conviction. Opp'n at 4.

In *Younger*, the U.S. Supreme Court suggested that extraordinary circumstances might be present where a state statute being enforced violates the U.S.

Constitution in every clause, sentence and paragraph. *Younger,* 401 U.S. at 53-54. In *Kugler,* 421 U.S. at 124, the U.S. Supreme Court held that *Younger* abstention should not be applied when extraordinary circumstances make it impossible for the state court to fairly and fully adjudicate the federal issues before it.

The extraordinary circumstances that plaintiff raises do not create an exception to *Younger.* Moreover, the state penal statutes of which plaintiff complains do not constitute a wholesale affront to the Constitution, *cf. Silveira v. Lockyer,* 312 F.3d 1052 (9th Cir. 2002), *cert. denied,* 540 U.S. 1036 (2003), and there is no basis for concluding the state courts cannot fairly resolve plaintiff's claims. Therefore, *Younger* abstention requires this court to defer to the state proceedings. In light of this conclusion, the court need not reach defendant's other arguments regarding dismissal of the federal claims.

F. State Claims

To the extent the complaint may be read as including state claims, it will be recommended that the district court decline to exercise jurisdiction over plaintiff's state claims in light of the recommended dismissal of federal claims. *See* 28 U.S.C. § 1367(c).

G. Leave to Amend

"Leave to amend need not be given if a complaint, as amended, is subject to dismissal." *Moore v. Kayport*

Package Express, Inc., 885 F.2d 531, 538 (9th Cir. 1989). *Younger* abstention bars all claims and relief plaintiff seeks in his first amended complaint. *Younger* will continue to bar all claims and relief until state appellate remedies are exhausted. The first amended complaint should be dismissed without leave to amend because any further amended complaint would have to be dismissed as well.[3]

Accordingly, IT IS HEREBY ORDERED that plaintiff's Chronology filed on September 23, 2004, construed as a request for judicial notice of the dates contained therein (docket no. 37, Ex. 23), is granted.

IT IS HEREBY RECOMMENDED that:

1. Defendant's motion to dismiss be granted;

2. The court decline to exercise jurisdiction over any pendent state claims; and

3. This action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to

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[3] Plaintiff argues that this court should stay the federal proceedings until the state proceedings are completed. In *Gilbertson v. Albright*, 381 F.3d 965, 968-69 (9th Cir. 2004) (en banc), the Ninth Circuit held that *Younger* abstention applies to civil actions seeking damages rather than injunctive relief, but in such a case, the federal proceeding should be stayed until the conclusion of the state action. In the instant case, however, plaintiff asks for the return of coins and a gold bar and for injunctive and declaratory relief, not damages. First Am. Compl. at 8.

the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within five days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: August 1, 2005.

/s/ Kimberly J. Mueller
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD E. WILMSHURST, Plaintiff, v. BILL LOCKYER, Attorney General, STATE OF CALIFORNIA; SUPERIOR COURT OF CALIFORNIA, COUNTY OF CALAVERAS, Defendants.	CIV. S-04-0988 DFL KJM PS ORDER

On April 20, 2005, Pro Se Plaintiff filed a motion for a temporary restraining order ("T.R.O.") in which he seeks to prohibit the Superior Court of California from conducting a criminal proceeding against him in *People v. Wilmshurst*, No. F3229.[1] Plaintiff argues that his First Amended Complaint presents the need for the federal court to stay the state criminal proceeding in *People v. Wilmshurst*, contending if the state proceeding is not stayed, he will suffer irreparable injury. Specifically, Plaintiff alleges that the

[1] Plaintiff sought a prior T.R.O. in this action, which was denied since Plaintiff did not establish irreparable injury or a substantial likelihood of success on the merits. Plaintiff's appeal of the denial is pending in the Ninth Circuit.

state proceeding should be stayed because it violates 22 U.S.C. § 2778 and 26 U.S.C. § 5848.

The T.R.O. Plaintiff seeks is barred by the doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971). This is evinced by the reasons stated in the Magistrate Judge's analysis of *Younger* in the Findings and Recommendations filed October 12, 2004, beginning at page 4, line 9 and continuing through page 6, line 20, which is adopted herein as part of the ruling on Plaintiff's request for a T.R.O.

Younger abstention applies here since Plaintiff has not shown that the state court does not provide an adequate opportunity to raise the arguments he presents in his request for a T.R.O. *Woodfeathers, Inc. v. Washington County, Or.*, 180 F.3d 1017, 1020 (9th Cir. 1999) ("Younger abstention applies with equal force, however, without regard to whether the state proceedings are pending in the trial or appellate court."). "State courts are presumed adequate to raise federal questions 'in the absence of unambiguous authority to the contrary.'" *Id.* (citation omitted).

Therefore, Plaintiff's request for a T.R.O. is denied.

IT IS SO ORDERED.[2]

Dated: April 21, 2005

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

[2] A courtroom deputy gave Plaintiff a copy of an order denying his T.R.O. yesterday and informed him that the final order would be filed today.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD E. WILMSHURST,

Plaintiff,

vs.

BILL LOCKYER, Attorney General,

Defendants. /

No. CIV. S-04-0988 DFL KJM PS

FINDINGS AND RECOMMENDATIONS

(Filed Jul. 7, 2004)

Plaintiff is proceeding pro se with an action under 28 U.S.C. §§ 1331 and 2284, seeking declaratory and injunctive relief; the action was filed on May 20, 2004. On June 30, 2004, plaintiff filed a motion for a temporary restraining order and for a hearing before a three judge panel[1] on his request for a preliminary injunction. Plaintiffs request for a temporary restraining order has been referred to this court under the authority of 28 U.S.C. § 636 and Local Rule 72-302(c)(21).

In his complaint, which is verified, plaintiff challenges the constitutionality of California's

[1] 28 U.S.C. § 2281 provides that a preliminary injunction restraining the enforcement or execution of a state statute shall not be granted by any district court or judge on grounds of unconstitutionality of the statute unless the application for relief is heard and determined by a district court of three judges, convened as provided in 28 U.S.C. § 2284.

Roberti-Roos Assault Weapons Control Act of 1989 ("AWCA"), Cal. Penal Code §§ 12275-12290, as applied to him. He seeks declaratory and injunctive relief preventing the defendant, the state Attorney General, from prosecuting him for violations of the AWCA. In support of his requests for a temporary restraining order and preliminary injunction, plaintiff avers he is a federally licensed firearms importer, 5/21/04 Declaration of Richard E. Wilmshurst (Decl.) ¶ 20 and Exs. 6 (license) & 7 (proof of payment of occupational tax); that on February 12, 2003, officials from the firearms division of the California Department of Justice searched his home and office in accordance with a search warrant and seized several weapons, Decl. ¶¶ 27, 30-31 & Ex. 11 (letter to Rico Oller); during the search plaintiff, who is hypertensive, experienced an episode of dangerously high blood pressure, Complaint (Comps.) ¶ 14; Decl. ¶ 32 & Ex. 11 at 2; since the search, he has suffered "several mini-strokes" and has been advised by his doctor to reduce the stress in his life, 6/30/04 Declaration of Richard E. Wilmshurst Re: Irreparable Harm ¶ 3; in May 2003, the Attorney General's office filed a complaint in Calaveras County charging plaintiff with eleven felonies based on the guns seized and a twelfth count based on fireworks stored by plaintiff, Compl. ¶ 18 & Ex. D (Felony Complaint); and the action was dismissed on April 12, 2004, but defendant Lockyer "has indicated his intention" to re-file the criminal charges. Compl. ¶¶ 20, 21.

Plaintiff argues he is entitled to a temporary restraining order because the state's threat to continue prosecution conflicts with federal preemption of the field of firearms importing, violates the foreign commerce clause, and interferes with his Second Amendment right to bear arms. He has given notice of his request for a temporary restraining order to counsel for defendant. 6/30/04 Declaration of Richard E. Wilmshurst Re: Notice.

The purpose in issuing a temporary restraining order is to preserve the *status quo* pending a full, contested hearing. The cases contain limited discussion of the standards for issuing a temporary restraining order due to the fact that very few such orders can be appealed prior to the hearing on a preliminary injunction. It is apparent, however, that *ex parte* requests for temporary restraining orders are governed by the same general standards that govern the issuance of a preliminary injunction. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977); *Century Time Ltd. v. Interchron Ltd.*, 729 F. Supp. 366, 368 (S.D.N.Y. 1990).

To prevail, the moving party must show either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the movant's favor. *See Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 700 (9th Cir. 1997); *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). The two formulations represent two points on a sliding scale with the focal point

being the degree of irreparable injury shown. *Oakland Tribune*, 762 F.2d at 1376. "Under any formulation of the test, plaintiff must demonstrate that there exists a significant threat of irreparable injury." *Id.* In the absence of a significant showing of possible irreparable harm, the court need not reach the issue of likelihood of success on the merits. *Id.*

Plaintiff's showing of harm relates to the risk to his health he asserts the state's prosecution represents. Although plaintiff has alleged he suffered from dangerously high blood pressure during the search and from several mini-strokes in the months since, and that a March 2004 CAT scan showed a small area of blood vessel damage, he does not demonstrate any clear connection between the state prosecution and his health; there is no independent evidence suggesting it was the stress of the prosecution that triggered the mini-strokes plaintiff alleges he suffered. In fact, through his criminal defense attorney he sought and was granted permission to act as co-counsel in the Calaveras County Superior Court action, which suggests his voluntary, active and unhampered participation in the state prosecution. Compl. ¶ 19 & Ex. E. He has initiated this federal action, acting as his own attorney. He has not demonstrated he will suffer irreparable harm unless the state's prosecution is restrained.

In addition, plaintiff has not demonstrated a likelihood of success on the merits. Plaintiff claims the activities of a federally licensed firearms importer are controlled by the President and Congress under

22 U.S.C. § 2278, and state regulation is thus preempted by federal law. He also claims the state statute interferes with foreign commerce, and violates the Second Amendment. 5/20/04 Points and Authorities at 4-8, 10-16.

It appears that plaintiff is a licensed importer of firearms within the meaning of the Gun Control Act of 1968, 18 U.S.C. § 921(a)(9); 27 C.F.R. § 478.41 (license to import), and has been permitted to import firearms contained on the munitions list established under the authority of 22 U.S.C. § 2778 ((a)(1), (b)(1)(A)(i) & (f)(1) and 27 C.F.R. § 447.43 (import permits). According to the regulations, items on the U.S. Munitions Import List that are firearms or ammunition "are subject to the interstate and foreign commerce controls contained in Chapter 44 of Title 18 U.S.C. . . ." 27 C.F.R. § 447.2(a). The regulations suggest that even though a licensed importer has registered to import arms covered by 22 U.S.C. § 2778, he nevertheless is subject to the provisions of the Gun Control Act, 18 U.S.C. § 921, *et seq.* A section of the act expressly provides:

> No provision of this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

18 U.S.C. § 927. Taking into account not only this express provision, but legislative history, related regulations, and constitutional principles, the Gun Control Act has been interpreted to permit, not preempt, state regulation of firearms. *Oefinger v. Zimmerman*, 601 F. Supp. 405, 411-12 (W.D. Pa. 1984), *aff'd*, 779 F.2d 43 (3d Cir. 1985) ("the federal scheme . . . does not displace the power of the State to determine that certain offensive weapons should not be possessed within the boundaries of the State"). Plaintiff has not pointed to any particularized direct conflict or inherent inconsistency between the state and federal law. Thus, he has not shown a substantial likelihood he will succeed on his preemption argument.

Regarding plaintiff's second argument, several courts have rebuffed attempts by gun manufacturers and retailers to remove state actions to federal courts, rejecting claims that such suits are preempted by the Commerce or Import/Export Clauses of the United States Constitution. U.S. Const. art. I, § 8, cl. 3 & § 10, cl. 2. *See, e.g.*, *Penelas v. Arms Technology, Inc.*, 71 F. Supp. 2d 1251, 1254-55 (S.D. Fla. 1999); *City of Camden v. Beretta U.S.A. Corp.*, 81 F. Supp. 2d 541, 546-48 (D. N.J. 2000). Plaintiff has not addressed the impact of these cases on his likelihood of success on the merits of his suit, and there is no indication he can overcome their reasoning.

Finally, the Ninth Circuit has recognized the Supreme Court has never found the Second Amendment to be applicable to the states. *Fresno Rifle and*

Pistol Club, Inc. v. Van De Kamp, 965 F.2d 723, 729 (9th Cir. 1992) (*citing United States v. Cruikshank*, 92 U.S. 542, 553 (1876)); *Nordyke v. King*, 319 F.3d 1185, 1191-92 & n.14 (9th Cir. 2003), *as amended* (Jan. 27, 2003), *cert. denied* ___ U.S. ___, 124 S. Ct. 803 (2003); *but see Silveira v. Lockyer*, 312 F.3d 1052, 1067 & n.17 (9th Cir. 2002); *Nordyke v. King*, 364 F.3d 1025, 1026-37 (9th Cir. 2003) (Gould, J., explaining in some detail his view of the "individual rights" conferred by the 2nd Amendment, in his dissent from a denial of rehearing en banc). Given the Ninth Circuit precedent applicable here, plaintiff has not demonstrated a substantial likelihood he will succeed on the merits of his Second Amendment argument.

Because plaintiff has established neither irreparable injury nor the substantial likelihood of success on the merits to support the issuance of a temporary restraining order, IT IS RECOMMENDED that plaintiff's June 30, 2004 request for a temporary restraining order be denied.

Because plaintiff has not made a sufficient showing to support the granting of his application for a temporary restraining order, the convening of a three judge panel to hear and determine the application is not required; therefore IT ALSO IS RECOMMENDED that plaintiff's request for such a panel should be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C.

§ 636(b)(1). Within twelve days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within five days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: July 7, 2004.

/s/ Greg G. Keller for KJM
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD E. WILMSHURST, Plaintiff-Appellant, v. EDMUND G. BROWN JR., The Attorney General of the State of California; et al., Defendants-Appellees. Defendants.	No. 06-15385 D.C. No. CV-04-00988-DFL/KJM Eastern District of California ORDER (Filed Jul. 30, 2007)

Before: GRABER, CLIFTON, and BEA, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

148 Cal.App.4th 374

Court of Appeal, Fourth District,
Division 3, California.
The PEOPLE, Plaintiff and Appellant,
v.
Andy SUN, Defendant and Respondent.
Nos. G035328, G036443.

March 7, 2007.

Tony Rackauckas, District Attorney of Orange County, Brian N. Gurwitz, Senior Deputy District Attorney, for Plaintiff and Appellant.

Harry Zimmerman, Paul S. Meyer, Costa Mesa, Blythe J. Leszkay, and Lightfoot, Vandevelde, Sadowsky, Crouchley, Rutherford & Levine, LLP, Los Angeles, for Defendant and Respondent.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, and Alison Merrilees, Deputy Attorney General, for Amicus Curiae.

OPINION

SILLS, P.J.

The District Attorney of Orange County appeals from two different orders of the Orange County Superior Court in the above-titled case. In one of these two consolidated cases, the appeal is from an order which dismissed nine counts in the indictment charging violations of Penal Code section 12020,

subdivision (a)(2), possession of large-capacity magazines.[1] This dismissal was effected by the court's "merging" 10 counts of violating section 12020 into one count, in direct contradiction to the statutory authority of section 12001, subdivision (*l*).[2] The District Attorney appeals from that portion of the order dismissing the nine counts of illegal possession of a large-capacity magazine, which is statutorily defined as "any ammunition feeding device with the capacity to accept more than 10 rounds. . . ." (See § 12020, subds. (a)(2) & (c)(25).) As the multiple counts were specifically authorized by statute, the District Attorney contends the court's action was in excess of jurisdiction. We agree and therefore reverse the order.

In the second of the consolidated cases, the District Attorney appeals from the trial court's granting a motion to suppress the firearms and ammunition – including the large-capacity magazines which

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] Originally, Sun faced 55 counts, but he raised a motion for the court to consolidate 10 counts of weapons possession – intended for sale – into one count (see § 12280, subd. (a)(1)), 10 counts of assault weapons possession into a second count (see § 12280, subd. (b)), 10 counts of large-capacity ammunition magazines into a third count (see § 12020, subds. (a)(2) & (c)(25)). The trial court granted the motion, resulting in a pleading charging five counts: one count of possessing assault weapons for sale, one count of possessing assault weapons, one count of possessing large-capacity magazines, and two counts of child endangerment.

were the object of the nine dismissed counts in the previous order – seized pursuant to a search warrant from Sun's home and business. In granting the suppression motion, and its consequent dismissal of the indictment, the trial court rested on the application of a federal statute. That statute continues to "romp[] through this case like the proverbial 800-pound gorilla" (*Gates v. Municipal Court* (1992) 9 Cal.App.4th 45, 53, 11 Cal.Rptr.2d 439), notwithstanding the prosecution's efforts to deflect attention from it. We affirm the order.

I

FACTS

Eric Maher, an agent from the state Department of Justice, submitted an affidavit to a magistrate and obtained a search warrant for Sun's home and business. The information in the affidavit identified Maher as having specialized training and experience in drug detection, investigation and seizure, as well as search warrant affidavit development and writing. Maher related in the affidavit that he received information from another state agent, Cris Abad, that Rick Hoffpauer, a federal inspector from the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, had inspected the equipment in Sun's possession as permitted under Sun's federal firearms license. In that inspection, Hoffpauer reviewed Sun's inventory documents, which were required of him for his license, and noticed he had listed approximately 150

Omega SPS-12 assault shotguns. He requested to view them, and Sun showed him 20 of them, although Hoffpauer observed there were other like containers. He then determined Sun was not licensed to possess or import assault weapons under California law; furthermore, Sun had not registered them under state law, and thus was in violation of section 12280. A neutral magistrate issued the warrant.

Agents of the California Department of Justice executed the search warrant on Sun's home and business. The state agents discovered an amazingly large inventory of assault weapons which Sun intended to sell,[3] as well as 23,000 "large-capacity magazine[s]." (§ 12020, subd. (a)(2).)[4] Due to the discovery of these items, the grand jury issued an indictment charging Sun with 10 counts of violating section 12020, subdivision (a)(2), based on the large-capacity ammunition magazines, and 43 counts of violating section 12280, subdivision (b), based on the assault weapons.

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[3] There were 510 assault weapons, such as the Omega-SPS-12, AK-47, Uzi, etc.

[4] Section 12020, subdivision (a)(2) prohibits the possession, importation or offer to sell "*any* large-capacity magazine." (Emphasis added.)

II

DISCUSSION

A. Motion to "Merge"

The defense raised a motion to "consolidate" the 10 counts into a single count, resulting in the dismissal of the remaining nine counts. It based its request on the trial court's inherent power under section 954[5] to control the manner in which charges are tried. However, it did not request *severance* of the charges, the remedy for misjoinder under section 954. (Cf. § 954 ["the court . . . in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. . . ."].)

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[5] Section 954 provides that an "accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . ; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. . . ."

Section 12001, subdivision (*l*) expressly grants the authority to the People to file a separate count for *each* of the large-capacity magazines fitting the statutory description of that item. It provides that "[f]or purposes of Section 12020, a violation of that section as to *each* firearm, weapon, *or device* enumerated therein shall constitute a distinct and separate offense." (Italics added.) Without explanation, the court disregarded this statutory provision, although the People specifically argued that it applied to the 10 counts of possessing large-capacity magazines. Instead, the court agreed with the defense that no more than *one* count could be charged, irrespective of the numbers of the contraband seized.

Sun responds that the trial court must have implicitly exercised its discretion in granting the consolidation motion, which we must review for abuse of discretion. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 408, 79 Cal.Rptr.2d 408, 966 P.2d 442.) He argues that the decision must be upheld because there was a rational basis for the consolidation – i.e., all items were possessed at one time and in one place, thus implying only one offense, as held in *People v. Kirk* (1989) 211 Cal.App.3d 58, 259 Cal.Rptr. 44 and *People v. Rowland* (1999) 75 Cal.App.4th 61, 88 Cal.Rptr.2d 900.

However, the *Kirk* case occurred *before* passage of section 12001, subdivision (*l*), which was enacted in 1994 specifically "to overrule the holding in *People v. Kirk,*" according to the legislative history for the statute. (See Stats.1994, 1st Ex.Sess.1994, ch. 32, § 5,

trigger. . . ." (26 U.S.C. § 5845(b).) This definition is essentially identical to that for a machine gun found in section 12200, possession of which is generally barred under state law. (See § 12220, subd. (a).) From the information presented in the warrant's affidavit and implicitly found by the trial court, the statute was applicable. No evidence was presented at the suppression hearing to contradict this finding.

Factual allegations such as those made by Amicus are more properly presented to the trial court than to us in the first instance. We review the record as preserved from below to determine if the trial court ruled properly. It must be noted that the *District Attorney* urged the trial court that no evidence other than the affidavit in conjunction with the pleadings was needed to resolve the motion to suppress.[9] Had these factual allegations been raised *and resolved* in the lower court, we would review those contentions and resolutions. We cannot resolve factual allegations raised for the first time on appeal. (See *People v. Lawler, supra,* 9 Cal.3d at p. 160, 107 Cal.Rptr. 13 507 P.2d 621; *People v. Manning, supra,* 33 Cal.App.3d at pp. 598-599, 109 Cal.Rptr. 531

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[9] Although the record is somewhat obscure, the District Attorney declared, "I want to make it clear *we don't dispute what the facts are.* We do dispute there was a Fifth Amendment violation. They claim we conceded that, and certain other things. *I think those are legal issues* that the court could resolve; *they are not issues that need to be resolved with witness testimony.* So therefore, that's why I'm entering this stipulation." (Emphasis added.)

p. 8657; see also *People v. Rowland, supra,* 75 Cal.App.4th at p. 65, 88 Cal.Rptr.2d 900.) The *Rowland* decision occurred after the passage of section 12001; subdivision (*l*), but involved a statute – section 4502 – not listed in subdivisions (k) or (*l*). Thus, both cases are inapplicable to the situation before us due to statutory abrogation.[6] Moreover, the approach has not been followed in another instance in which the word, "any," was used, yet lenity was not granted, permitting multiple counts to be charged and found. (See *People v. DeGuzman* (2003) 113 Cal.App.4th 538, 545-548, 6 Cal.Rptr.3d 739 [*Kirk* holding rejected in prosecution for explosive possession offenses under §§ 12303.2 and 12303.3].)

Moreover, Sun's response fails to understand the definition of consolidation, as that term is used in section 954. "Consolidation of accusatory pleadings,"

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[6] Quite recently, a sister court determined that the word, ammunition, carries both singular *and* plural meanings. (*In re Carleisha P.* (2006) 144 Cal.App.4th 912, 920, 50 Cal.Rptr.3d 777.) Thus, in a prosecution of a minor for possessing "live *ammunition*" in violation of section 12101, subdivision (b), the prosecution could only charge one count of the statute, irrespective of the number of individual bullets found in her possession and irrespective of the different *types* of ammunition represented there. (*Id.* at pp. 918-923, 50 Cal.Rptr.3d 777.)

However, the *Carleisha P.* case is of no assistance to Sun, as he was not charged under any statute prohibiting possession of "ammunition." Rather, he was charged under section 12020, subdivision (a)(2), which prohibits possession of a "large-capacity magazine." Thus, the *Carleisha P.* holding and rationale are entirely inapplicable.

as used in section 954, means that multiple counts, charged originally in separate pleadings, are *tried* together (§ 954), not that multiple counts are *merged* into one. Merger is a separate doctrine, and occurs only when multiple offenses are found to be necessarily included in one another. (See *People v. Ortega* (1998) 19 Cal.4th 686, 692-693, 80 Cal.Rptr.2d 489, 968 P.2d 48.) In such a case, section 654 – *not* section 954 – permits dismissal of those counts charging the necessarily included offenses. However, by definition, this occurs only after conviction as section 954 specifically provides "[a]n accusatory pleading may charge . . . different statements of the same offense . . . [and] the defendant may be convicted of any number of the offenses charged," notwithstanding one may be included within the other. (*Ortega, supra,* 19 Cal.4th at 693, 80 Cal.Rptr.2d 489, 968 P.2d 48 ["The necessarily included offense rule is used to determine whether a defendant improperly *has been* convicted of both a greater offense and an included offense, or properly has been convicted of separate offenses." (Italics added.)].

The court's order, dismissing nine counts of the indictment, must be reversed.

B. Suppression Ruling

The trial court also granted the defense motion to suppress all evidence seized under the warrant. It stated in its ruling that it found "suppression of the evidence obtained by the State of California is

required by 26 U.S.C. section 5848. The search was based on evidence obtained from the defendant's compliance with the National Firearms Act [NFA]." The District Attorney appeals from this order, contending there was nothing in the affidavit lifted from any records Sun filed or kept as required by the NFA; and, even if there was such evidence, there is no authority that a warrant issued by a magistrate should be suppressed notwithstanding any arguable violation of title 26 United States Code section 5848(a). Lastly, the District Attorney contends, the fruits of an executed search warrant are admissible under the "good faith" exception of *United States v. Leon* (1984) 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, irrespective of errors made prior to its issuance. Because suppression of evidence is only possible if *mandated* by federal law (see Cal. Const. art. I, § 28, subd. (d)), suppression was, he argues, unauthorized in this situation.

We review rulings on motions brought under section 1538.5 by the standard established in *People v. Lawler* (1973) 9 Cal.3d 156 at page 160, 107 Cal.Rptr. 13, 507 P.2d 621: "In [a suppression motion] the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. . . . The trial court also has the duty to decide whether, on the facts found, the search was unreasonable within the meaning of the Constitution. . . . [I]f review is [] sought, it becomes the ultimate responsibility of the appellate court to measure

the facts, *as found by the trier,* against the constitutional standard of reasonableness." (Emphasis added; see also *People v. Manning* (1973) 33 Cal.App.3d 586, 598-599, 109 Cal.Rptr. 531.)

The affidavit for the search warrant for Sun's home and business related that the federal inspector *examined* Sun's records and *then determined* that a series of assault weapons were listed on those documents, weapons that the inspector knew were prohibited by California law but not by federal law. He then confirmed the presence of 20 of those assault shotguns in Sun's inventory before contacting the state authorities with his observations and information. The language in the affidavit indicates that the inspection and observation of those assault weapons were triggered by the records provided to the federal inspector by Sun. Thus, the records that Sun provided to the inspector were the exclusive source of information from which the entire investigation grew.

Title 26 United States Code section 5848(a) provides: "No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence."

Subsection (b) of that statute provides the sole exception to that prohibition: "Subsection (a) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law *with respect to the furnishing of false information.*" (Italics added.)

The District Attorney contends that this privilege or immunity grant applies only to evidence proffered in a criminal *trial,* not to information alleged in a search warrant affidavit or any non-trial aspect of a criminal prosecution. He relies on two cases from the federal district court in Michigan to support his position: *U.S. v. Wolfe* (E.D.Mich.1999) 32 F.Supp.2d 945 and *United States v. Hunter* (E.D.Mich.1994) 843 F.Supp. 235. He acknowledges these opinions are not binding on our Court, but argues they provide compellingly persuasive support. We disagree: Not only is there higher authority contradicting that interpretation, but both cases are clearly distinguished – legally and factually - from the present situation.

In *Wolfe,* a state-issued search warrant was executed on Wolfe's home, and the officers found marijuana, marijuana-cultivation equipment, and a stash of illegal firearms. The *federal* authorities proceeded to obtain an indictment against Wolfe for these violations. In an original motion to suppress, the federal court denied the motion, which was then amended and again denied by the federal court. In its initial ruling, the federal court found that the warrant was supported by adequate probable cause and, even if not, the officers reasonably relied in good faith

on the magistrate's assessment. Thus, suppression was unjustified. (*U.S. v. Wolfe, supra,* 32 F.Supp.2d at pp. 948-949.)

Subsequent to the initial search, the state officers obtained a second search warrant – whose affidavit included a reference to Wolfe holding a federal firearms license – and re-entered the premises to search for tax records. Those records were then turned over to the federal prosecuting authorities by the state officers. Wolfe brought another suppression motion, contending the reference to his federal firearms license in the affidavit breached the confidentiality of tax returns provision in the NFA. (Cf. 26 U.S.C. § 6103.) This motion was denied because suppression was not an appropriate remedy for a breach of confidentiality under that statute; moreover, there was no evidence that mere status as a licensee constituted tax return information under this confidentiality provision. (*U.S. v. Wolfe, supra,* 32 F.Supp.2d at pp. 951-953.)

In response, Wolfe contended the privilege or immunity statute of 26 U.S.C. section 5848 applied to his situation, thereby taking his case out of the exclusive application of the confidentiality statute. The court relied on an earlier opinion – *United States v. Hunter* (E.D.Mich.1994) 843 F.Supp. 235 – and reiterated its interpretation of the privilege statute to be limited to evidence admitted in a criminal trial. Relying on the *Hunter* opinion, the federal court held that information mandatorily disclosed under the NFA by a licensee can be used for *investigative*

purposes. (*U.S. v. Wolfe, supra,* 32 F.Supp.2d at 953.) It is for this point that the District Attorney invokes both the *Hunter* and *Wolfe* opinions, arguing Sun's records were only used for investigative purposes and thus the privilege statute of section 5848 was inapplicable.

Higher authority appears to deal with the matter quite differently. In *United States v. Freed* (1971) 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356, the United States Supreme Court noted that it had previously found certain provisions of the NFA to violate the Fifth Amendment. (See *Haynes v. United States* (1968) 390 U.S. 85, 96-100, 88 S.Ct. 722, 19 L.Ed.2d 923.) In response to the *Haynes* opinion, Congress addressed the fatal errors, revising the NFA by specifically including the privilege or immunity provision of 26 U.S.C. section 5848(a). As noted in *Freed,* "The scope of the privilege extends, of course, to the *hazards* of prosecution under state law for the same or similar offenses." (*Freed, supra,* 401 U.S. at p. 605, 91 S.Ct. 1112, italics added.)

In *Freed,* a California resident and his wife were indicted for possessing "unregistered" hand grenades. Registration required information be divulged and certain tax burdens be met before transfer could be done under the revised NFA. Freed responded to the indictment, contending his Fifth Amendment rights were violated as established in *Haynes*; and the NFA as interpreted by *Haynes* required evidence of knowledge, which his indictment failed to allege. Justice Douglas rejected the contentions, emphasizing that

Congress had specifically created the privilege provision of section 5848 in response to the *Haynes* opinion and had thereby cured the Fifth Amendment problem. (*United States v. Freed, supra,* 401 U.S. at p. 605, 91 S.Ct. 1112.) Moreover, the NFA required no scienter element. (*Id.* at p. 607, 91 S.Ct. 1112.) In so ruling, the Supreme Court rested its conclusion on the Solicitor General's "represent[ation]s to us that *no information filed* is as a matter of practice disclosed to *any* law enforcement authority," and that "the information in the hands of Internal Revenue Service, as a matter of practice, is not available to state or other federal authorities and, as a matter of law, cannot be used as evidence in a criminal proceeding with respect to a prior or concurrent violation of law." (*Id.* at pp. 604-606, 91 S.Ct. 1112, italics added.) It emphasized this point in assessing the self-incriminatory potential of the statute to be "merely trifling or imaginary[.]" (*Id.,* at p. 606, 91 S.Ct. 1112.) It found a lack of self-incrimination potential because of "the unavailability of the registration data, as a matter of administration, to local, state, and other federal agencies. . . . Since the states and other federal agencies *never see the information,* [Freed] is left in the same position as if he had not given it, but 'had claimed his privilege in the absence of a grant of immunity.' [Citation.] This, combined with the protection against use to prove prior or concurrent offenses, satisfies the Fifth Amendment requirements

respecting self-incrimination." (*Ibid.*, italics added; see also *Gonzales v. Superior Court* (1980) 117 Cal.App.3d 57, 67-68, 178 Cal.Rptr. 358.[7])

Such strong assurances that the Fifth Amendment is not violated are entirely undermined if, as the District Attorney encourages us, we hold the provisions of the privilege statute are to be limited to actual trial evidence and do not apply to information that triggers a prosecution. Other federal jurisdictions have not followed such a restricted interpretation of the privilege or immunity provision. In *United States v. Bright* (5th Cir.1973) 471 F.2d 723, not only was the provision understood to bar the use of any registration information to revoke parole, but the circuit court relied on the United States Attorney's representations that "no information obtained from Bright's registration of the shotgun would be available for use" before it concluded Bright's Fifth Amendment rights had not been threatened by the NFA requirements. (*Id.* at p. 727.)

The District Attorney's interpretation of the privilege or immunity provision, moreover, overtly

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[7] *Gonzales v. Superior Court, supra*, 117 Cal.App.3d 57, 178 Cal.Rptr. 358, involved interrogatories supplied to a series of alleged fathers of minor children whose mothers received aid via Aid to Families with Dependent Children funding. The District Attorney of Orange County filed civil paternity actions to establish the paternity of these children as a step to procure the fathers' reimbursement payments to the county for these funds. The interrogatories attempted to obtain the fathers' admissions to allegations of paternity. (*Id.* at pp. 59-61, 178 Cal.Rptr. 358.)

contradicts the language of the statute itself. "No *information* or evidence obtained from . . . records required to be . . . retained by a natural person in order to comply with any provision of [the NFA] . . . shall . . . be used, directly *or indirectly,* as evidence against that person in a criminal proceeding. . . ." (26 U.S.C. § 5848, italics added.) Had Congress intended that a document submitted by a person for either licensing or registration purposes under the NFA was barred only from being admitted in a *trial* against that person, it could have easily said so. Instead, Congress specifically spelled out that it was not just *evidence* that was privileged, but any *information* used either *directly or indirectly* as evidence in a criminal proceeding. No ambiguity exists in the language of the statute; thus, no interpretation needs to be crafted to explain or eliminate that ambiguity. (See Code Civ. Proc., § 1858 ["In the construction of a statute or instrument, the . . . Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, *or to omit what has been inserted*; . . . a construction is, if possible, to be adopted as will give effect to all." (Emphasis added.)].)

Moreover, the *Wolfe* opinion relied exclusively and entirely on selected language from *United States v. Hunter, supra,* 843 F.Supp. 235, as the authority for its unique holding. The earlier *Hunter* opinion stated that section "5848(a) bar[red] the use of such records *as evidence.*" (*Id.* at p. 252, original italics.) However, it did not mean that to be the *exclusive* application of

the privilege statute. The *Hunter* court went on to say that it "read[] this provision to prohibit the introduction of protected records in a trial; it does not appear to proscribe the Government's utilization of the records so far *in this case* in order to investigate and indict Defendants." (*Ibid.*, italics added.) The inapplicability of the privilege was not due to the *investigatory use* of the information; it was due to the exception to the privilege found in 26 U.S.C. section 5848 (*b*). The statutory exception to the privilege applied to *subsequent* offenses relating to false information. Hunter and his colleagues were charged with conspiracy because they submitted allegedly *false* information in their applications to transfer machine guns and machine gun conversion kits. (*Id.* at pp. 238-239.) Additionally, they allegedly submitted the falsified applications before engaging in the alleged overt acts in furtherance of the conspiracy for which they were charged. Thus, the statutory exception found in 26 U.S.C. section 5848(b) applied, and Hunter could not invoke the privilege and immunity provisions of 26 U.S.C. section 5848(a).

The *Hunter* court emphasized that 26 United States Code section 5848(b) created an exception to the privilege or immunity provisions of section 5848(a), and that this exception was for "'future crimes' and 'furnishing false information'. . . ." (*United States v. Hunter, supra,* 843 F.Supp. at p. 252.) It found the defendants' alleged conspiracy was a *future crime of furnishing false information* under the NFA and the supplementary legislation known as

the Gun Control Act. (*Id.* at pp. 250-253.) Thus, the protection of the privilege conferred by 26 United States Code section 5848(a) was unavailable to the defendants, not because the defendants' applications were used as the basis for an investigation, but because the case was a "future crime" involving the "furnishing [of] false information" specifically excepted under subsection (b) of the statute.

The *Wolfe* court lifted the excerpted language from *Hunter,* but failed to retain the context in which it was made. In short, the *Hunter* opinion on which the *Wolfe* holding relied fails to support the District Attorney's argument in the case before us: *Hunter* holds that the statutory exception found in 26 United States Code section 5848(b), remains the sole instance in which information or evidence provided by a firearms dealer under the NFA may be used *in any way* against that dealer. That one instance is if the dealer is charged with a *future crime* or based on *falsified information, statutorily mandated to be given.*

Sun is faced with neither a crime resulting from his falsification of his NFA documents nor a future crime occurring subsequent to the transactions reflected in his NFA records. The documents reviewed by the federal inspector reflected Sun's *concurrent* possession of firearms. Thus, he properly was protected by the privilege or immunity provisions of 26 United State Code section 5848 at the time the federal inspector breached the confidentiality protections

of 26 United States Code section 6103 and divulged the privileged information to the state authorities.

Amicus curiae, the Attorney General of California (Amicus), argues that the safety of California citizens requires that we *encourage* the cooperation between federal and state authorities as practiced in the case before us. Additionally, he contends the NFA was *not* the authority under which Hoffpauer inspected Sun's records; it was the Gun Control Act of 1968 which empowered Hoffpauer to inspect, and there is no record-keeping responsibility under that statute. Thus, he argues, there was no basis to apply the privilege protection of 26 United States Code section 5848(a) – which relates to the NFA, not the Gun Control Act – much less to suppress the evidence. Finally, Amicus proposes that none of the items observed by Hoffpauer – and seized under the search warrant – fell under the federal definition of "firearms" covered by the NFA. This latter argument *appears* to fail: 26 United States Code section 5845(a) defines a firearm for the purposes of the NFA in very specific detail and there is no indication in the record whether the seized items fit this description,[8] but the chapter also defines a "machine gun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the

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[8] It is unknown to us whether most of the seized items fit these very detailed specifications as the record is devoid of any such discussion.

["'"A proceeding under section 1538.5 to suppress evidence is one in which a full hearing is held on the issues before the [trial] court *sitting as a finder of fact.*" . . . ' . . . In such a proceeding the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.'" [Original emphasis.].)

Nothing we say here in any way seeks to discourage the continued cooperation between state and federal police authorities. To the contrary, we encourage it *consistent with the law established for both those jurisdictions.* In this instance, however, the Congress, in direct response to United States Supreme Court mandate, has provided that information *compelled* from a weapons dealer may not be used against him in a criminal proceeding of any kind, apart from the exception provided in 5845(b). We abide by that clear declaration, as must the police authorities in all jurisdictions.

Finally, we address the most difficult question in this quagmire. Should one police agency be able to clothe itself with the robe of good faith, when it obtains information from another police agency in direct contradiction of federal law, and then uses it for the very purpose prohibited by the federal law? Neither Hoffpauer nor Maher informed the

magistrate – to whom Maher presented the affidavit – that 26 United States Code section 5848(a) protected the information from which Hoffpauer learned of the assault weapons. Nonetheless, the District Attorney and Amicus join in arguing that suppression was barred once the magistrate placed his or her imprimatur to search on the warrant. (See generally *United States v. Leon* (1984) 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (*Leon*).)

The good faith exception found in *Leon* rests on the deterrent purpose for the exclusionary rule. Exclusion as a remedy for Fourth Amendment violations[10] was designed to deter police misconduct. Thus, when an officer acts in objective good faith reliance on a search warrant, "[p]enalizing the officer for [a] magistrate's error, rather than his [or her] own, cannot logically contribute to the deterrence of Fourth Amendment violations." (*United States v. Leon, supra*, 468 U.S. at p. 921, 104 S.Ct. 3405.)

On the other hand, the officer's reliance in *objective* good faith is the crux of the rule. In *People v. Jackson* (2005) 129 Cal.App.4th 129, 28 Cal.Rptr.3d 136, the fruits from the search permitted by warrant were suppressed because the information establishing probable cause for that warrant was obtained from an *illegal* wiretap. As the wiretap authority, 18

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[10] We do not intend any comment on the exclusionary rule as applied to remedy due process violations. (See e.g., *People v. Galland* (2006) 146 Cal.App.4th 277, 286, 52 Cal.Rptr.3d 799.)

United States Code sections 2510 et seq., was established long before the judicially created "good faith exception," its bar was prevailing over the exception crafted by the Supreme Court after its passage. Moreover, Congress had never attempted to provide – although given the opportunity – such a loophole in the intervening years. "Moreover, the policy reasons that led to the adoption of a good faith exception to the judicial exclusionary rule in cases involving search warrants do not apply to the statutory exclusionary rule in cases involving wiretap orders. In a case involving a search warrant, the true check on law enforcement's abuse of power was 'the detached scrutiny of a neutral magistrate.' To obtain a wiretap, the person seeking the order must first obtain the approval for the wiretap *from the United States Attorney General* or an authorized designee. [Citation.] Hence, 'if an appellate court determines wiretap evidence was gathered under a legally erroneous order, the government cannot place the blame on the magistrate who issued the order.' [Citation.]" (4 Witkin & Epstein, Cal.Criminal Law (3d ed. 2006 Supp.) Illegally Obtained Evidence § 12, pp. 120-121 [italics added].)

By analogy, the same thing occurred here. Local law enforcement obtained information from another jurisdiction's law enforcement agent who, *under the authority which granted him the power to inspect, also was ordered to keep confidential and privileged all information obtained from the entity he inspected.*

Nonetheless, the local agents presented the information to a magistrate and then blanketed themselves under the sanitizing "robe" of that unknowing magistrate once the warrant was signed. Such manipulation of a magistrate will be repeated if we permit one police agency to use information that another police agency is barred from using. Police reliance cannot be deemed in "objective good faith" when the original agent is aware the incriminating information was obtained by less than legal means. As the state's reliance on the authority of the magistrate issuing the warrant was not in objective good faith, suppression of the fruits of the search was proper.

III

DISPOSITION

In case numbered G036443, the trial court's order suppressing the evidence and then dismissing the remaining indictment is affirmed. In G035328, the trial court's order, dismissing nine counts of a violation of section 12020, subdivision (a)(2), is reversed. The case is remanded with the following directions: The trial court must determine if dismissal of the remanded nine counts is now required based on the seizure of evidence deemed in violation of the Fourth Amendment as upheld in case numbered G036443. If so, the trial court must dismiss the remaining nine counts in the indictment. If not, and the People have evidence to prove those counts

extraneous to the fruits of the search under the warrant, those counts may proceed.

WE CONCUR: BEDSWORTH and FYBEL, JJ.

EDMUND G. BROWN JR.
Attorney General

State of California [Seal]
DEPARTMENT OF JUSTICE

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April 5, 2007

Chief Justice Ronald George
Associate Justices
Supreme Court of the State of California
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

(Filed Apr. 6, 2007)

Re: *People v. Sun*, 130 Cal.App.4th 1512
Court of Appeal No. ~~G03643~~ [G035328, G036443]; Orange County Superior Court No. 04Z0064 SA2006102450

Dear Chief Justice George and Associate Justices:

Pursuant to rule 979(a) of the California Rules of Court, the Attorney General respectfully requests that this Court decertify the opinion in *People v. Sun* for publication in the official reports. The Court of Appeal certified the opinion for publication on March 7, 2007. This request for depublication request is timely. (Cal. Rules of Ct., rule 8.1125, subd. (a)(4).)

The opinion should be decertified because (1) it confuses the applicability of two different federal statutes, the Gun Control Act (GCA) and the National Firearms Act (NFA); (2) it erroneously and unfairly purports to find, on the basis of a unique and inadequate record, that state and federal agents violated the NFA and then dishonestly misled a magistrate about it; (3) it threatens to impair enforcement of firearms laws by creating uncertainty among federal and state agents about the lawfulness of federal-state cooperation in enforcing those laws; and (4) it needlessly clouds the correct understanding of the GCA and the NFA as explained in the recent Court of Appeal decision in *People v. Wilmshurst* (2007) 146 Cal.4th 621.

Background

In this case, the Court of Appeal incorrectly concluded that defendant Sun's possession of assault weapons and other firearm-related items was governed by the National Firearms Act rather than the Gun Control Act. On that basis, it erroneously ruled that an ATF Investigator violated the NFA by disclosing information from Sun's GCA record books to a Department of Justice agent who used that information as evidence that Sun violated a state firearm statute. Accordingly, it upheld the wholesale suppression of evidence of illegal firearms found at defendant Sun's business premises on the basis that suppression was required by a special immunity provision of the NFA. Further, the appellate court castigated the agents not only for

their supposed violation of the NFA but for their supposed dishonesty in not reporting the "violation" to the magistrate who issued the search warrant for Sun's business premises. The appellate court's fundamental misunderstanding of the two federal statutes might be explained by the very unusual and truncated manner in which appellant Sun's motion to suppress evidence was litigated in the superior court. Regardless, the effect of the decision will be to confuse the law, to cast doubt on federal-state cooperation, and to unfairly criticize the agents whose conduct was proper.

Federal law provides two schemes for regulating firearms: the Gun Control Act of 1968[1] and the National Firearms Act. The GCA, not the NFA, is the basis for issuing licenses to dealers, manufacturers and importers of firearms such as appellant Sun. It is the only federal authority for the issuance of a license to import firearms into the United States. (18 U.S.C. § 923; 27 CFR § 478.41 et seq.) The GCA requires federal firearm licensees (FFLs) such as Sun to keep records – Acquisition & Disposition (A&D) Books and sales records (Forms 4473) like the ones inspected and disclosed in the Sun case – and to make those records available for inspection. (18 U.S.C. § 923(g)(1).) Routine compliance inspections by the ATF – such as the one conducted in *Sun* – are authorized by the GCA. (27 C.F.R. § 478.23.)

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[1] 18 U.S.C. Chapter 44. Its regulations are found at 27 CFR Part 478.

Nothing in the GCA precludes the ATF from disclosing GCA records to state law enforcement officials. Because GCA records must be made "continuously available for inspection by Government officials during business hours," they have "the status of 'public documents.'" (*United States v. Scherer* (7th Cir. 1975) 523 F.2d 371, 375-76.) The NFA and its immunity provisions, in contrast, never apply to an FFL importer, unless that importer has paid a "special occupational tax" to import into the United States the specific type of weapons that qualify as "firearms" under the NFA, or the FFL unlawfully possesses those weapons. The NFA, does not apply to any records that FFLs are required to maintain and make available for routine inspection by the ATF; it does not protect those GCA records from disclosure by ATF to state law enforcement officials; and it does not preclude the use of those GCA records in criminal proceedings against the FFL importer. The only records the NFA protects are the tax records that an NFA taxpayer must keep to prove that he or she paid the "special occupational tax." The NFA immunity provisions apply only when the tax payment records are disclosed and sought to be used, either directly or indirectly, in a criminal proceedings against the taxpayer for a crime that occurred prior to, or contemporaneous with, the payment of the tax.

Andy Sun was licensed by the federal Bureau of Alcohol, Tobacco and Firearms (ATF) as an "FFL importer" of firearms who did business in California. During a routine ATF inspection of Sun's business,

ATF Industry Operations Investigator Rick Hoffpauer examined Sun's GCA inventory records: his A&D Book and transfer records. Investigator Hoffpauer noticed that the records contained information about assault weapons. He also observed assault weapons in Sun's inventory. When questioned by Investigator Hoffpauer about assault weapons, Sun admitted that he advertised them for sale on the Internet. Because assault weapons are illegal to possess or sell in California (even though they are not illegal under federal law), Investigator Hoffpauer notified the Firearms Division of the California Department of Justice about his observations. His information was used as the basis for a judicial warrant to search Sun's home and business. Hundreds of illegal assault weapons were seized and used to indict Sun for the commission of 55 felonies.

Counsel for Sun filed motions to suppress the evidence seized from Sun on the basis that it was obtained in violation of the NFA.[2] Defense counsel asserted, incorrectly, that the NFA and its immunity provision – section 5848 – prohibited the disclosure and use in a criminal case of the information in defendant Sun's firearms records that Investigator Hoffpauer discovered and provided to California Department of Justice. The deputy district attorney compounded defense counsel's error by stipulating that the NFA applied to Sun's records and the disclosure of

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[2] 26 U.S.C. Chapter 53. Its regulations are found at 27 CFR Part 479.

information from them. The assertions of defense counsel, and the stipulation, apparently were based upon confusing the GCA with the NFA, although it is unclear whether the court or the parties were even aware of the GCA because the GCA was never mentioned in the trial court proceedings.

The trial court granted Sun's motions to suppress the evidence on the basis that the warrant used to seize the evidence was obtained in violation of the NFA and Sun's Fifth Amendment rights. On appeal, the Attorney General filed an amicus curiae brief that explained that the GCA, and not the NFA, governed the case. The Court of Appeal nevertheless affirmed the trial court's suppression order on the erroneous theory that the use of the firearms evidence against Sun somehow violated the immunity provision of the NFA.

Argument

If the *Sun* opinion were to remain published, it would cause unnecessary confusion about whether the NFA prevents the ATF from disclosing information obtained in a compliance inspection of a federal firearms licensee to state and local law enforcement agencies. There is nothing unusual or illegal about the type of investigation that occurred in *Sun* and this type of investigation should be allowed to take place in the future. ATF routinely shares information obtained during compliance inspections of federal firearms licensees with state and local authorities,

because it is legal to do so. But ATF does not disclose NFA records, or information obtained from those records, to state law enforcement officials, because it is illegal to do so. From the *Sun* decision, however, other courts, defense attorneys, and prosecutors may erroneously assume that such lawful and routine law enforcement cooperation is improper.

The risk of confusion is especially high because the facts recited in the *Sun* decision support the conclusion that the GCA – not the NFA – governed the records and the disclosure of records at issue in the case. For example, in its statement of facts, the Court of Appeal mentions "Sun's federal firearms *license*" and the "*inventory* documents, which were required of him for his *license*" (emphasis added). Those facts support the legal conclusion that the records in the case were GCA records. The GCA is the only federal authority for the issuance of federal firearms licenses. It governs the documentation necessary to transfer firearms in a licensee's inventory and makes that documentation subject to inspection and disclosure by the ATF.

It is true that the Court of Appeal stated that "information presented in the warrant's affidavit and implicitly found by the trial court" supports the conclusion that the NFA "was applicable." But that information only undermines the court's conclusion. The "150 Omega SPS-12 assault shotguns" in Sun's books and the twenty guns seen by Investigator Hoffpauer in Sun's inventory, referred to in the search-warrant affidavit, are assault weapons.

Assault weapons are not "firearms" under the NFA; they are "firearms" under the GCA. Likewise, the specified records are required to be maintained in compliance with either state law (DROS records described in California Penal Code section 12077), or in compliance with the GCA (Forms 4473 described in 27 CFR section 478.124; A & D Books described in 27 CFR section 478.122). None of the items sought are the tax records governed by the NFA. The fact that those items are mentioned as evidence that the NFA applied in Sun would likely confuse other courts faced with that same type of evidence.

The Court of Appeal's analysis of state firearms law and its relationship to federal firearms law also threatens to breed confusion. The Court of Appeal reasoned that, because a "machinegun" is a "firearm" under the NFA and also contraband under state law, the NFA "statute was applicable." However, Sun was not charged with violating Penal Code section 12220, the state law that prohibits the possession of machineguns. The affidavit contained no information that Investigator Hoffpauer observed machineguns in Sun's inventory.[3] More important, the fact that

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[3] Only one of the firearms seized by DOJ and listed in the return of the warrant initially appeared to meet the NFA definition of a "firearm" Item 210 was described in the evidence inventory as "Bren, Unknown Model or Make, Light Machine Gun No Set # or Other Markings." (CT 76.) However, subsequent examination of the item revealed that it was, in fact, a replica gun and not a firearm of any type. Thus, Sun was not charged with a violation of Penal Code section 12220(a).

California and federal law both regulate the same item (a machinegun) and could, in theory, both apply to the same person does not mean that they both apply in all cases. The Court of Appeal acknowledged that "there is no indication in the record whether the seized items fit this description" of an NFA firearm, but did not come to grips with the fact that the absence of NFA firearms only evinces the NFA's inapplicability to the case.

The Sun decision, ill-explained and based on an unusually opaque record, is unfortunate because it undermines the full and correct treatment of the same issue in the recent published decision by the Third District Court of Appeal in *People v. Wilmshurst* (2007) 146 Cal.4th 621.[4] Unlike the record in *Sun,* the record in *Wilmshurst* showed that the trial court considered the meaning and applicability of *both* the NFA and the GCA. The basic facts of the two cases, however, are virtually identical. The Third District Court of Appeal summarized the facts in *Wilmshurst* as follows:

> [a] federal firearms official went to the defendant's home (his business premises) to

[4] The *Wilmshurst* decision was published approximately two weeks before the oral argument in *Sun* and brought to the attention of the deputy district attorney handling the appeal in *sum*. Amicus did not bring the case to the attention of the Court of Appeal because the deputy district attorney assured Amicus that he would file the paperwork necessary to discuss the case at the oral argument.

perform a compliance inspection in connection with the defendant's federal license for importing weapons. Her supervisor had assigned her the case after determining that the defendant was not on a state list of authorized firearm dealers, which he obtained from time to time for purposes of cross-checking federal licensees. This triggered an interest in determining whether the defendant was conducting any operations that would require compliance with state law. In the course of her review of his records and about 21 firearms, she found several that came within California's ban against assault weapons (although they were proper under federal law) . . . Pursuant to a policy of her department, she reported her observations of possible violations of state law to California firearms officials, even though there had not been any request from them for this information. . . . The California authorities determined that the defendant was not a registered firearms dealer under California law, nor had he taken advantage of a "grandfathering" registration program for otherwise-illegal assault weapons possessed before the state ban went into effect. On this basis, they obtained a search warrant for the defendant's car dealership and the outbuilding at his residence. On the first floor of the outbuilding were a storage area and his living quarters with a bedroom. Under the bed and in a wooden footlocker were a machine gun and two assault rifles; seven other illegal assault weapons were in the storage

> area. These were the weapons that were the basis for the charges against the defendant. The agents also seized every other firearm they encountered, some of which were lawfully possessed. (*Id,* at pp. 625-26.)

The trial court rejected Wilmshurst's argument that the NFA and its immunity provision applied to the case. The Court of Appeal upheld the trial court's ruling, explaining in succinct terms the absurdity of the defense theory: "[t]he National Firearms Act (26 U.S.C. § 5801 et seq.) taxes and regulates (with various registration and other requirements) the import, manufacture, making, and transfer of machine guns, destructive devices, and certain other firearms. (See 26 U.S.C. § 5845.) The chapter contains a statutory use immunity from criminal prosecution for information obtained "in order to comply with any provision *of this chapter* [i.e., 26 U.S.C. §§ 5801-5872]" (italics added). By contrast, the duty on the defendant to maintain records and to permit warrantless inspections of them stems from the Gun Control Act of 1968. (18 U.S.C, § 923(g)(1)(B)(ii).) *The use immunity provision of the National Firearms Act has no application in this context, and the defendant does not provide any authority for importing its provisions into an entirely different act. The contention is consequently without merit.*" (*Id.,* at p. 631, emphasis added.)

Finally, the *Sun* decision should be depublished because it concludes that an ATF investigator violated federal law and a California Department of

Justice special agent deceived a neutral magistrate when no such misconduct occurred, and no factual evidence in the record other than the erroneous stipulation of the deputy district attorney supported the conclusion. It is certainly true that Special Agent Maher's affidavit did not include a statement that NFA information was obtained in violation of 26 U.S.C. 5848. The affidavit did not include such a statement because there was no violation. No NFA information was disclosed by ATF or obtained by DOJ.[5] No laws were violated by ATF or the California Department of Justice. The unfair and untrue allegations of misconduct in the Court of Appeal opinion should not be published.

Sincerely,

/s/ Alison Y. Merrilees
ALISON Y. MERRILEES
Deputy Attorney General
Bureau of Firearms

For EDMUND G. BROWN JR.
Attorney General

Attachments:

A – Opinion

B – Amicus Brief

[Attachment A Omitted In Printing]

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[5] Disclosure of NFA information to Special Agent Maher would have been a felony under federal law. (26 U.S.C. § 7213.)

[SEAL]

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S151601

April 5, 2007

www.atf.gov

VIA FEDERAL EXPRESS

The Honorable Ronald M. George, Chief Justice,
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

(Filed Apr. 6, 2007)

G035328/G036443

Re: People v. Sun, 148 Cal. App. 4th 374 (Cal. App. 6.Dist. 2007), Case No. ~~G03643~~ (Orange County Superior Court No. 04Z0064)

Dear Sirs and Madams:

Pursuant to California Rules of Court Rule 8.1125(a), formerly Rule 979(a), the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), an agency within the United States Department of Justice, respectfully requests the Court to order the opinion certified for publication in the above-referenced case not be published. A copy of the opinion is enclosed. This request is timely filed.

At almost every stage of this case lawyers and the California courts have conflated and confused two

separate and distinct federal laws – the Gun Control Act of 1968 ("GCA") and the National Firearms Act of 1934 ("NFA"). They have done so based on a record that the Court of Appeal characterized as "somewhat obscure." *People v. Sun*, 148 Cal. App. 4th at 387, fn 9. The confusion over the law and the limited record in this case has led the Court of Appeal to issue an opinion that not only accepts as fact a stipulation that information used by the California Department of Justice ("CADOJ") was obtained by ATF under the NFA, but takes that "fact" and turns it into a finding that an ATF employee released information to CADOJ in violation of federal law and that both the ATF employee and the CADOJ agent misled the magistrate in obtaining the search warrants. In truth, no ATF employee released any NFA information or otherwise violated federal law in this case and the record is devoid of any evidence to suggest otherwise.

This case was the result of a referral made by Richard Hoffpauer, an ATF Industry Operations Investigator, to CADOJ regarding approximately 150 SPS-12 shotguns found in the defendant's possession during a routine compliance inspection of his business, Defense Technology, Inc. The shotguns are assault weapons under California law and were not properly registered with CADOJ. As a result of the referral of information, CADOJ Special Agent Eric Maher obtained a search warrant for Sun's business and home. During the execution of these warrants numerous unregistered assault weapons were found and Sun

was charged in the Superior Court of Orange County California for violations of California Penal Code §§ 12280(a)(1) (unlawfully keeping for sale assault weapons), 12280(b) (illegal possession of assault weapons), 12020(a)(2) (unlawfully keeping for sale large-capacity magazines), and 273a(a) (child endangerment).

Sun moved to suppress the evidence uncovered during the execution or the warrants, citing a provision of the NFA that restricts the use of NFA information, 26 U.S.C. § 5848. It was at this point that the case went off the rails: no one in the Superior Court – not the Deputy District Attorney, the defense attorney or the Superior Court Judge – realized the NFA is only one of two federal statutes regulating firearms or that the NFA, unlike the GCA, is an extremely narrow statute. As a result, the attorneys and the Court appear to have assumed that the records reviewed by Investigator Hoffpauer were records kept pursuant to the NFA and governed by the restrictions of 26 U.S.C. § 5848.

This assumption was erroneous. As set out in the attached declaration of Industry Operations Investigator Richard Hoffpauer,[1] none of the records Investigator Hoffpauer reviewed were kept pursuant to the

[1] In light of the confusing and incomplete record in this case, we have enclosed a declaration from Industry Operations Investigator Richard Hoffpauer to clarify exactly what information was shared with CADOJ. We other this declaration solely for purposes of supporting this request to depublish the opinion.

NFA. They were records required by the GCA, codified as 18 U.S.C. §§ 921, et seq., a statute that is broader than the NFA and has a much different purpose. The GCA was originally enacted in 1968 to, among other things, "strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders." House Report No. 90-1577 (June 21, 1968). To better regulate the interstate commerce in firearms, the GCA establishes a system that restricted and regulated who may buy, sell, and ship firearms. First, it prohibits certain persons, such as felons, from possessing firearms and ammunition. See 18 U.S.C. § 922(g). Second, it requires all dealers, manufacturers, and importers of firearms to have a federal firearms license and, generally speaking, only these licensees may ship or receive firearms in interstate commerce. 18 U.S.C, § 922(a). Third, it authorizes the Attorney General to create implementing regulations that would require federal firearms licensees to create and maintain certain records. 18 U.S.C. § 923(g)(1)(A). To ensure that licensees comply with the GCA and its implementing regulations, the Act also gives the Attorney General inspection authority related to GCA records. 18 U.S.C. § 923(g)(1)(B).

In contrast, the NFA is a tax statute. It was enacted in 1934 to address growing concerns about violence associated with organized crime. Consequently, unlike the GCA, the NFA does not apply to firearms generally, bid applies only to those considered especially

dangerous such as short-barreled rifles and shotguns, machineguns, silencers and destructive devices. *See* 26 U.S.C. § 5845. Moreover, because it is a tax statute, the only records the NFA requires are those related to the payment of Special Occupational Taxes, which apply to manufacturers and dealers in NFA firearms, the taxes associated with making and transferring individual NFA firearms, and records related to the registration and transfer of NFA firearms. 26 U.S.C. §§ 5801, 5811, 5821 and 5841. Like other tax statutes, the NFA contains strict uses on information obtained under its provisions. 26 U.S.C. § 5848. Such information, is also protected as tax information under 26 U.S.C. § 6103. To ensure the compliance with these provisions, NFA information is stored by ATF in a separate information system, the National Firearms Registration and Transfer Record.

The case here did not involve any information obtained as a result with Sun's compliance – or non-compliance – with the NFA and, thus, the restrictions contained in 26 U.S.C. § 5848 did not apply to the information reviewed by Investigator Hoffpauer and relied on by CADOJ for the search warrants for Defense Technology and Sun's residence. The records in this case were acquisition and disposition records that Defense Technology was required to create and maintain as a licensed dealer under the GCA and its implementing regulations. *See* 18 U.S.C. § 923(g) and 27 C.F.R. 478.125(e).

Indeed, the firearms that served as the basis for the referral to CADOJ – Omega SPS-12 shotguns – are

not NFA firearms. Investigator Hoffpauer did not – and could not – have passed on any "information or evidence obtained from an application, registration, or records required to be submitted or retained" in order to comply with the NFA to CADOJ and CADOJ could not have relied upon such information to get the search warrants because the NFA does not require any application, registration, or other records for the weapons possessed by defendant.

Accordingly, as set out in the attached declaration, Investigator Hoffpauer conducted an inspection of a GCA licensee, Defense Technology, as provided in 18 U.S.C. § 923(g)(i)(B). As part of that inspection he reviewed the licensee's GCA records, which revealed the licensee to be in possession of firearms that were assault weapons under California law. He confirmed the possession by looking at the licensee's inventory and then referred the matter to CADOJ. There is no prohibition on ATF providing CADOJ with GCA information or with CADOJ using that information to obtain search warrants.[2] *See People v. Wilmshurst*, 146 Cal. App. 4th 621 (Cal. App. 3 Dist. 2007).

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[2] In recent years, Congress has included restrictions on ATF's ability to disclose certain GCA information. Such restrictions, however, specifically exclude situations like the one here where ATF shares the information with "a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution[.]" Pub. L. 109.108 (Nov. 22, 2005).

The information contained in Investigator Hoffpauer's declaration about the true nature of the information referred to CADOJ was not in the record before the Court of Appeal. The California Attorney General attempted to clarify federal law for the Court, but by that time the damage to the factual record had been done and the assumptions made in the Superior Court carried over into the Court of Appeal. So, for example, the Court of Appeal held that Congress "has provided that information compelled from a weapons dealer may not be used against him in a criminal proceeding of any kind, apart from the exception provided in 5845(b)," *Sun* at 387, taking as fact that firearms dealers keep records under the NFA when, as explained above, it is the GCA that requires such records. *See, e.g., Wilmshurst* at 631 ("the duty on the defendant to maintain records and to permit warrantless inspections of them stems from the Gun Control Act of 1968 . . . [t]he use immunity provision of the National Firearms Act has no application in this context, and the defendant does not provide any authority for importing its provisions into an entirely different act. The contention is consequently without merit.")

Although it is frustrating that the Court of Appeal seemed to be as confused as the Superior Court about the applicability of the GCA and the NFA in this case, it is understandable given the state of the record. What is less understandable is the Court of Appeal using the incomplete lower court record to essentially assert that Investigator Hoffpauer violated the NFA

restrictions, which would be a felony under 26 U.S.C. § 7213, and that both he and Special Agent Maher misled the magistrate about the source of the information. While it is true, as the Court of Appeal states, that "[n]either Hoffpauer nor Maher informed the magistrate – to whom Maher presented the affidavit – that 26 United States Code section 5848(a) protected the information from which Hoffpauer learned of the assault weapons," *Sun* at 387, there was nothing misleading about this omission because none of the information was protected by § 5848. As Investigator Hoffpauer's declaration makes clear, the information he reviewed and had access to was information required under the GCA and not under any provision of the NFA.

From the beginning this case has been hampered by an incomplete record and confusion over the federal firearms laws. Publishing it provides no useful guidance to the public and, in fact, is likely to confuse rather than clarify the federal firearms laws. Perhaps more seriously, it would unfairly stain the reputations of two investigators. We respectfully request that this Court order the opinion certified for publication in the above-referenced case not be published.

Sincerely,

/s/ Pamela J. Hicks
Pamela J. Hicks
Division Counsel

Enclosures

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Sun*
Case No.: G036443

I declare that I am an employee with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), United States Department of Justice. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at ATF's Los Angles Field Division for the collection and processing of correspondence by mailing with the United States Postal Service. In accordance with this practice, correspondence placed in the internal mail collection system at the ATF Los Angeles Field Office is deposited with the United States Postal Service that same day in the course of business.

On *April 5, 2007,* I served the attached letter to the Supreme Court and its enclosures by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the internal mail collection system at ATF's Los Angeles Field Division, 350 S. Figueroa Street, Suite 800, Los Angeles, California 90071, addressed as follows:

SEE SERVICE LIST, ATTACHED HERETO

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 5, 2007, in Los Angeles, California.

/s/ William Andrae
William Andrae, Declarant

SERVICE LIST

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April 16, 2007

VIA CALIFORNIA OVERNIGHT

The Honorable Ronald M. George,
Chief Justice and the Associate
Justices of the Supreme Court
Of California
350 McAllister Street
San Francisco, California
94102-4797

RE: Requests for Depublication
SUPREME COURT No. S151601
People v. Sun 148 Cal. App. 4th 374
March 07, 2007
Nos. G305328, G036443

Dear Justices of the **California Supreme Court:**

Pursuant to California Rules of Court Rule 8.1125(b), Cal-Sierra Arms Distributors, acting as a Federally Licensed Firearms Importer and its owner, Richard E. Wilmshurst respectfully request that this Court deny the requests for de-publication made by Alison Y. Merrilees, Deputy Attorney General with the Bureau of Firearms and Pamela J. Hicks,

Division Counsel, of the Los Angeles Bureau of Alcohol, Tobacco, Firearms and Explosives. This response is in opposition to the de-publication requests and is timely.

THE WELL REASONED OPINION OF FOURTH DISTRICT COURT OF APPEAL, *PEOPLE v. SUN* MUST NOT BE ORDERED DE-PUBLISHED

The *Sun* opinion points to the facts and bases of its holding that the immunity provisions of Title 26 U.S.C. § 5848 prevent criminal prosecution of a Federally Licensed Firearms Importer when his import inventory meets the requirements of the United States Munitions List [Title 22 U.S.C. § 2778]. When a Federally licensed Firearms Importer's firearms inventory meets the requirements of the firearms inventory determined by the President of the United States and Congress, any state inventory statute is preempted by Federal Law to apply to the Licensed Importer.

THE CALIFORNIA BUREAU OF FIREARMS EXCEEDS ITS LEGAL AUTHORITY WHEN IT ATTEMPTS TO REGULATE THE INVENTORY AND IMPROT/EXPORT BUSINESS OF A FEDERALLY LICENSED IMPORTER.

It is obvious that U.S.C. § 2778 determines the firearms business and inventory of a Federally Licensed Firearms Importer. Section 2778 is entitled **"Control of arms exports and imports"**

> "(a) Presidential control of exports of defense articles and services, guidance of policy, etc; designation of United States Munitions List; issuance of export licenses; condition for export; negotiations information. (1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services."

The California Bureau of Firearms ("CBF") and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") have a right and duty to cooperate in the application of certain firearms legislation, however, not legislation that is preempted by Federal law [Title 22 U.S.C. § 2778] or specific Congressional statute [Title 26 U.S.C. § 5848] as found by the Fourth District.

CBF and ATF actions in *Sun* and *People v. Wilmshurst* 146 Cal. App. 4th 621 (January 07, 2007) would be violations of *Sun's* and *Wilmshurst's* Fifth Amendment rights when § 5848 was violated.

The publication of the Sun case brings to the attention of CBF and ATF that there are limitations to the arrest and prosecution of Federally Licensed Firearms Importers when they are operating their businesses following Federal guidelines established by Congress and the President of the United States.

THERE IS A CONFLICT BETWEEN THE THIRD DISTRICT IN *WILMSHURST* AND THE FOURTH DISTRICT IN *SUN* OF THE APPLICATION OF SECTION 5848 TO FIREARMS INVENTORY REQUIRED REPORTING AS A BASIS FOR A CRIMINAL SEARCH WARRANT AND PROSECUTION.

On February 21, 2007 a PETITION FOR REVIEW was filed in the *People v. Wilmshurst* No. S150379. *Wilmshurst* requests that *Sun* should remain published and the *Sun/Wilmshurst* conflict in the application of Title 26 U.S.C. § 5848 between the Third and Fourth Districts be determined by this Court.

The Second Amendment is a strong political issue in California and the Legislature has passed legislation that appears to violate Federal Law. The Legislature has been advised by Legislative Counsel of this possibility when so called "assault weapon" legislation was proposed. The anti-firearms political groups have been successful in suspect "assault weapons" legislation being passed.

There is a specific need in California to determine the proper application of § 5848. The Attorney Generals in the other forty-nine states have not pushed this envelope. The U.S. Supreme Court cases discussed in *Sun* provides a reasonable legal basis why they have not.

WITHIN TEN MONTH[1] THE NINTH CIRCUIT COURT OF APPEAL WILL DETERMINE THE APPLICATION OF SECTION 5848 TO THE FACTS FOUND IN *WILMSHURST* IN A HEARING DE NOVO.

Wilmshurst brought an action in the Federal District Court in Sacramento on May 20, 2004 for an injunction based upon Title 26 U.S.C. § 5848, entitled *Richard E. Wilmshurst v. William Lockyer* No. CIV.S 04-0988-DFL KJM-PS in an attempt to stop the criminal prosecution in Calaveras County.

The action was dismissed based upon *Younger*. The Attorney General has been successful with *Younger* even though *Younger* should not have applied to a State criminal proceeding when a Federal statute provided restrictive use of evidence in that criminal proceeding.

The legal credibility of a pro se plaintiff when opposed by a creditable and able Deputy Attorney General is not good. The original results of the filing vs. the Ninth Circuit hearing de nova should provide a much different result.

The petitioned review by this Court and the Ninth Circuit will provide Federally Licensed Firearms Importers in California and the balance of the other forty-nine states with direction on the proper

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[1] *A case in the Ninth Circuit may take up to two years from the filing of the Notice of Appeal until the case is decided on appeal*

application of § 5848 to their firearms business. The CBF has attempted to hide the real defendants from the trial courts. The defendants are actually businesses dealing in firearms. The businesses are Defense Technology, Inc. (*Sun*) and Cal-Sierra Arms Distributors (*Wilmshurst*).

CONCLUSION

De-publication must not take place. The CBF admits at page 5 of its letter:

> "The basic fact of the two cases, however are virtually identical."

The PETITION FOR REVIEW must be granted to correct the conflict between the Fourth and Third Districts in the application of § 5848 to two cases with identical facts.

Sincerely,

/s/ Richard E. Wilmshurst
Richard E. Wilmshurst
Juris Doctor, Pro se

PROOF OF SERVICE

I am a citizen of the United States and am employed in Calaveras County. I am over the age of eighteen (18) years and not a party to this action; my business address is 1103 S. Main Street, Angels Camp, California 95222.

On May 21, 2007, I served the following document: **Letter, Honorable Chief Justice and Associate Justices of the California Supreme Court** by placing a true copy thereof enclosed in a sealed envelope and served in the manner and /or manners described below to each of the parties herein and addressed as follows:

Via California Overnight Mail

Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4783	**Original and 6 copies**
Office of the Attorney General Attn: Janine R. Busch Deputy Attorney General P. O. Box 944355 Sacramento, CA 94244-2550	**Attorney for The People of the State of California**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Angels Camp, California, on May 21, 2007.

/s/ Karen Pace Zacches